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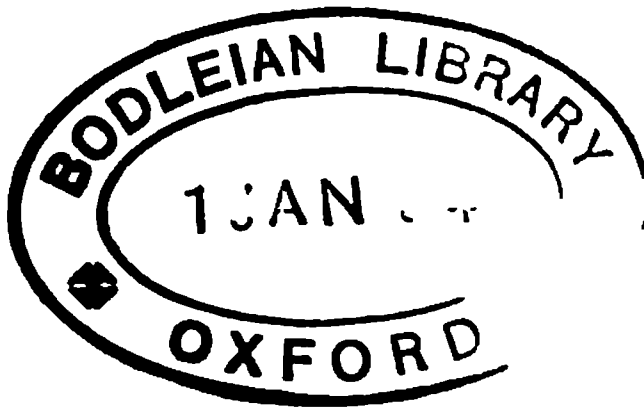
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REVISED AND ADAPTED TO THE PRESENT STATE OF THE LAW

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AND
W. HOWLAND ROBERTS,
OF THE MIDDLE TEMPLE AND WESTERN CIRCUIT, ESQUIRE, BARRISTER-AT-LAW;
JOINT AUTHOR OF "A SUMMARY OF THE LAW ON THE LIABILITY OF EMPLOYERS."

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PREFACE TO THE THIRD EDITION.

As the Second Edition of this book dates as far back as the year 1847, it will be apparent that very considerable alterations in the Statute law, and many additions to the authorities, bearing upon the subjects treated of, have been made since the last publication of the work. Thus, of the long series of important decisions upon the difficult question of annexation, commencing with the well-known case of *Hellawell v. Eastwood* in 1850, all are of a date subsequent to that of the last edition; whilst of enactments immediately affecting the law of fixtures, it will be sufficient to mention the Bills of Sale Acts, the Bankruptcy Acts (from that of 1849 to the one of the late Session), the Ecclesiastical Dilapidations Act, 1871, and in particular the Statutes of 1851, 1875, and the present year, respecting the rights of agricultural tenants. It was inevitable, therefore, in the preparation of a new Edition, that a considerable portion of the book should be rewritten, and that a large amount of new material should be introduced.

In preparing the present Edition the Editors have endeavoured to bring a work of some authority into accordance with the present state of the

law; but, consistently with this, to preserve, so far as possible, the original text and arrangement of the book. The method adopted by them being similar to that in the former Editions, will be best explained by the following passage from the preface by the late Mr. Joseph Ferard, to the Second Edition:—

“ In availing himself of the modern decisions,
“ the Editor has followed the course adopted in
“ the first Edition; and has stated each case some-
“ what fully when discussing the rights of the
“ particular class of claimants to which it more
“ particularly refers. But when any principle
“ recognized by the Court in deciding upon one
“ class of cases, has been found more or less
“ applicable to another class also, he has thought
“ it advisable to notice it briefly in the chapter
“ assigned to that other class. He trusts that
“ the facility thus afforded to the practitioner, in
“ investigating the claims more immediately
“ under his consideration, will be deemed a suffi-
“ cient apology for some little repetition.”

Some doubt was at first felt as to the advisability of retaining in its original form the section treating of trespass, trover, &c. (Part II. Chap. I. § 3); but, although distinctive forms of action have in great measure lost the importance which they formerly had, yet it was felt that even now it is impossible to disregard the substantial distinctions between the corresponding remedies under present procedure.

The subject of deodands has been omitted from the present Edition, as possessing no practical interest at the present day; but many of the authorities upon this doctrine have been still alluded to throughout the book, in illustration of existing peculiarities in the different kinds of property treated of in the course of the work.

The Editors trust that the utility of the Summary of Rules contained in Appendices (B), (C), and (D) has been increased by the plan adopted of giving in each case, as far as practicable, a direct reference to the pages of the text where the authorities may be found. The Agricultural Holdings (England) Act, 1883, has been printed at length in Appendix (F); and in Appendices (A), (E), and (G) will be found matter which it was thought might be conveniently transferred from the body of the work.

Several American cases have been referred to in support of propositions for which no direct English authority could be found. And it is believed that all decisions of any importance in the United Kingdom have been referred to in this Edition.

In the Table of Cases references have been given to contemporaneous reports not cited in the text; and as great pains have been taken in verifying the authorities referred to in the former Edition, it is hoped that accuracy in this respect has been secured.

The Editors desire to express their great obligation to their friend, Mr. George H. Wallace, of Lincoln's Inn, for having kindly undertaken the preparation of the New Index, and for the care with which he has executed that portion of the work.

In conclusion the Editors trust that in judging the present Edition the profession will bear in mind the difficulty of dealing with a highly artificial and technical branch of the law; a difficulty increased in the present instance by the long interval which has elapsed since the last Edition was published.

C. A. F.
W. H. R.

THE TEMPLE,
1st December, 1883

EXTRACT FROM PREFACE

TO THE FIRST EDITION.

THE branch of law which is examined in the following pages has not hitherto been made the subject of any distinct Treatise. The investigation of it, however, seems to be important, since it will be found to present greater difficulties than usually belong to legal researches. This is owing to the refined distinctions which the law recognizes between real and personal property, and which give rise to many intricate questions in respect of property partaking of both these characters.

With regard to the *Doctrine of Fixtures*, which forms the principal subject of the work, it appears singular that so little attention should have been bestowed upon it in any of the modern publications. For it relates to a species of property which, in many instances, is of very great value; and involves questions of daily occurrence, which affect the rights as well of landlord and tenant, as of many other classes of individuals in the ordinary relations of society.

It has been the chief object of the present Treatise to lay down some general principles and rules relative to this

species of property. In determining how far this design has been accomplished, some indulgence will perhaps be allowed, on account of the peculiar state of the law upon the subject. For the Doctrine of Fixtures rests on a series of judicial decisions in contravention of an ancient rule in favour of the freehold. And as these decisions arose out of particular emergencies, and were pronounced at different periods of time, it is extremely difficult to reduce them into an uniform system, or to extract from them any principles of general application.

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ss. 35—37	80
s. 42	80
s. 53	79
s. 54	80, 81, 101
s. 55	81, 93
s. 56	87
s. 57	86
s. 58	82 (l), 157 (d)
s. 59	86
s. 60	82
s. 61	80, 81, 82 (l), 85 (s)
s. 62	79 (t), 81 (f)
s. 64	79
c. 62 (Agricultural Holdings (Scotland) Act, 1883)	79 (v)

ABBREVIATIONS.



The following Abbreviations, in addition to those commonly in use, have been employed in the present Edition :—

Am. Rep. . . . .	. American Reports.
Bell's App. Cas.	. Bell's Scotch Appeal Cases.
D. . . . .	. Scotch Court of Sessions Cases (2nd series).
Degge . . . . .	. Degge's Parson's Counsellor (7th ed.).
Finch . . . . .	. Finch's Law.
Hayes & Jones .	. Hayes & Jones' Reports (Ireland).
Hun (N. Y. Rep.)	. Hun's New York Reports.
Ir. Ch. R. . . . .	. Irish Chancery Reports.
Ir. C. L. R. . . .	. Irish Common Law Reports.
Ir. R. C. L. . . .	. Irish Reports, Common Law.
Jones . . . . .	. Jones' Reports (Ireland).
Jon. & Lat. . . .	. Jones & Latouche's Reports (Ireland).
Law of Test. . .	. Richardson's Law of Testaments (2nd ed.).
Lud. Cas. . . . .	. Luder's Election Cases.
M. . . . .	. Scotch Court of Sessions Cases (3rd series).
Mass. . . . .	. Massachusetts State Reports.
Missouri . . . .	. Missouri State Reports.
Perkins . . . . .	. Perkins' Profitable Booke.
R. . . . .	. Scotch Court of Sessions Cases (4th series).
S. . . . .	. " " " (1st series).
Swinb. Wills . .	. Swinburne's Treatise on Wills (7th ed.).
Vernon (N. Y. Rep.)	. Vernon's New York Reports.
Went. Off. Executors .	. Wentworth's Office of Executors (14th ed.).

INTRODUCTION

TO

THE LAW OF FIXTURES.

THE Law of Fixtures affords a remarkable illustration of the strong tendency which may be observed in the jurisprudence of a country to adapt itself to the varying manners and necessities of society. The privileges which exist in respect of this species of property are in derogation of the principles of the common law, and have been gradually introduced and established by the judges, who, in this instance, have exercised a sort of legislative authority. The strict rules of the law respecting waste, which had their origin in feudal times, were found to be incompatible with the notions of property entertained in a more civilised age; and as the Legislature did not interfere to abolish them, it became indispensably necessary that their practical operation should be modified and controlled. The Courts, therefore, although they did not venture to abandon altogether the principle of the ancient law, considered themselves at liberty to mitigate its rigour; and by a series of decisions they have, from time to time, engrafted upon it the various exceptions and qualifications which form the subject of consideration in the following Treatise. In the present introductory chapter it is proposed to examine the nature of the several innovations which have thus been made upon the maxims of feudal policy; in order that a distinct view may be taken

of the steps by which the Courts have proceeded towards perfecting this branch of the law. And for this purpose it will be necessary, in the first place, to consider the origin of the general rule of law in respect of annexations to the freehold.

The rule of law, that whatever is affixed to the freehold becomes essentially a part of it, and is subjected to the same rights of property as the land itself, originated in a state of manners very different from that which prevails in the present day. The fee-simple was not in ancient times divided into a multiplicity of particular estates; personal property was scarcely regarded as an object of concern to the Legislature; and the proprietors of the freehold were the authors of those very laws which settled the conflicting claims of themselves and their tenants. Notwithstanding the great change which has taken place in the habits and opinions of society, this rule in favour of the freeholder still remains; and it must be regarded as the *general rule* of law at the present day, although it appears to be both inequitable in its principle, and injurious in its effects to the spirit of improvement.

It is curious to observe the first attempts which were made by the Courts to afford relief from the strictness of the ancient law. Much hesitation is apparent in the early decisions as reported in the Year Books and other authorities; and many subtle distinctions are there relied upon by the judges, which have since been very properly exploded. It appears, however, that so early as in the reign of Henry VII., an exception from the law respecting annexations to the freehold was recognised in the particular case of *tenants*; and these were said to be at liberty to species of articles, if erected at their own

expense on the demised premises. It has indeed been represented that the Courts at the period spoken of allowed this privilege to tenants from a politic concern for the interests of trade and manufactures; but it seems very doubtful whether any principle of so liberal a character is to be traced in their judgments. An important step was however made, when the Courts thus assumed the power of restraining the rights of the freeholder without the express sanction of the Legislature.

The modern authorities proceeded on more unequivocal principles; and from time to time they introduced exceptions of so extensive a nature as almost to have subverted the general rule. For, in the first place, it has been the recognised doctrine of the Courts, ever since the time of Queen Anne, that a relaxation should be allowed in favour of erections and utensils put up for *trading and manufacturing* purposes. A very important description of property was thus exempted from the operation of the ancient rule. And this innovation was sanctioned by the judges, not because it was warranted by any particular law, but altogether upon an enlarged principle of public policy.

In progress of time other exceptions were admitted. For it was found that the state of refinement to which the country had arrived, in matters of *domestic furniture and decoration*, rendered the rules of the feudal law incompatible with the general convenience of society. Accordingly, in this instance also, the judges found it expedient to modify the ancient law, with the view of adapting it to the manners of the times; and by a series of determinations a further exception in favour of articles for *ornament and domestic use* was gradually introduced.

After the relaxation in favour of *trade* had been long and clearly established, an attempt was made to apply the principle of that exception to the case of *agricultural* erections. This attempt was warranted by judicial opinions of high authority, and seems to derive great support from analogy and general reasoning. But, in this instance, as no direct precedent could be found in which erections or buildings for the purpose of agriculture had been considered as privileged, the Court of King's Bench refused to countenance this further innovation upon the general rule.

This decision was never questioned, and accordingly the general rule attached in all its force to agricultural erections until the year 1851. In that year the Legislature thought fit to interfere, and to make an exception in cases where the landlord's consent to the erection had been obtained; reserving, however, to the latter a right of purchase. The Act then passed, as might have been anticipated, conferred no appreciable benefit upon agricultural tenants, inasmuch as the required consent was rarely given. Accordingly, in 1875, a further innovation was made by the Agricultural Holdings Act of that year, which, for the first time, introduced the principle of compensation for tenants' improvements, and also conferred upon the tenant an ample right of removing agricultural fixtures, but retained the landlord's privilege of purchase. This Act, however, became practically a dead letter, owing to its almost universal exclusion by the terms of the contract of tenancy. In the present year (1883) a fresh enactment has been passed, with a view to further ameliorating the position of agricultural tenants. This statute—the Agricultural Holdings Act, 1883—has re-

pealed the Act of 1875, but not that of 1851, and by conferring a more extensive right to compensation, and power of removing erections and fixtures, has made a still greater inroad upon the ancient rule of law, as applied by the Court of King's Bench. It still remains to be seen whether there being, as it seems, no restraint upon contracts regulating the right *of removal*, this enactment will have the effect of restraining, within a narrow compass, the general rule which has hitherto prevailed with respect to agricultural erections.

Previously to the above-mentioned decision of the King's Bench, the exigencies of society had rendered it necessary that the ancient law should receive some qualification in the case of erections made with a view to the enjoyment of the *profits of land*. And accordingly by several decisions an exception, similar to that in favour of trade, has been allowed in respect of steam-engines and other machinery for the purpose of working mines, collieries, &c. Erections of this description have usually been considered as a species of trade fixtures, and removable on the same grounds. It is obvious, however, that the privilege of trade, as regarded in this point of view, is construed with great latitude; and such a construction, if carried to its full extent, would have the effect in great part of abrogating the rule which prevails, apart from statute, in respect to agricultural erections.

With respect to the *extent* to which the decisions have carried the above exceptions, it is to be observed, that the judges, in admitting the innovations in question, have evinced a great anxiety to remove from themselves the charge of infringing upon ancient principles, or of affording a ground for future encroachment. They have accord-

ingly taken great pains to support their decisions by a variety of reasons derived from the facts of each particular case. And hence it happens, that in questions respecting the right to fixtures, it is in general necessary not only to inquire whether an article, its object and purpose considered, falls within any of the admitted exceptions, but to advert also to many other incidental circumstances, which have occasionally been relied upon in the judgments of the Courts. And, indeed, where there is a direct precedent in favour of the removal of a particular fixture, the right of the claimant may still be subject to great uncertainty, if he does not stand precisely in the same situation as the party who has been held entitled to remove it. For the Courts have repeatedly affirmed that the exceptions from the ancient rule of law have been carried to a different extent in the several cases of landlord and tenant, executor of tenant for life or in tail and remainder-man or reversioner, and executor of tenant in fee and the heir. And yet the limits within which the privileges of these parties are respectively confined are nowhere pointed out; neither have any satisfactory reasons been assigned by the Courts for the distinctions thus laid down, from a consideration of which the rights of these several classes of individuals might be inferred.

In the course of the preceding remarks the reader has been presented with a general outline of the state of the law relating to the doctrine of fixtures. And from this view of the subject he will, perhaps, be of opinion, that further improvements are requisite for rendering this branch of law at once intelligible in its principles, and precise in its terms. And for this purpose it would seem, in the first place, desirable that no change of property should result from the mere fact of annexing a personal

chattel to the freehold, unless in cases in which some principle intervened which might be deemed reasonable in the present day. For it seems a reflection upon the jurisprudence of the country, that a general rule of law which is productive of much inconvenience to the public, should have no better foundation than the motives of feudal policy. Indeed, it will be found that this has been partially recognised in the case of agricultural tenants by the statutes above alluded to (*a*).

(*a*) When the rules of our own jurisprudence appear open to animadversion, it may be useful to consult the writings of foreigners, with a view to ascertain the nature of the provisions which, in a similar state of manners, seem to be best suited to the wants and general convenience of society. From such an inquiry in the present instance, it may perhaps be thought to result, that notwithstanding the rule of the English law may, as a *general* rule, appear objectionable, yet that particular cases might be mentioned, in which it would be consistent with a just and reasonable principle, that the property in things fixed to the freehold should be transferred to the ultimate proprietor of the soil. Upon the subject of fixtures it seems to be the more general opinion among the writers on French law, that in ordinary cases a landlord is not entitled to any additions made by his tenant, and can only insist on his leaving the premises in the condition they were in at the commencement of his term; on this principle, that "*nemo detrimento alterius locupletior fieri potest.*" There is, however, an exception in favour of the landlord in cases where improvements have been made with the obvious design of permanent annexation, or where to remove them must occasion their entire destruction: because in this case the landlord would be prejudiced without any benefit resulting to the tenant. In some cases, also, the French authors think that the landlord will have a right to improvements made by the tenant, on offering him a sum of money which will enable him to procure other things of the same description. And this is considered to be the law in respect of trees planted by a tenant, unless in a nursery-ground. The landlord, they say, is entitled to the growing trees on tendering the value of the wood. The same rule, however, does not hold when the matters annexed by the tenant are of a rare or precious description, and for which he may be supposed to have a particular affection. *Vide Desgodets, Lois des Bâtimens; Notes sur Desgodets, par Goupy; Lepage, Lois des Bâtimens;*

But, if the right of removal is still to be regarded as an *exception*, instead of constituting the general rule, it ought to be extended as far as the principles of policy and public convenience will allow. If, therefore, it is considered that the purposes to which buildings, machinery, or utensils are appropriated ought to be the criterion by which that right is to be tried, these purposes should at least not be arbitrarily selected, nor too narrowly construed. Upon this ground it may, perhaps, be thought advisable, that some

Traité de Locations, par Leopold. See also Code Civil, Liv. 2, tit. 1, Art. 517 *et seq.*; 534 *et seq.* According to the Code of the Civil Law, the rule upon these questions is, that such moveables as are fixed to the freehold, *perpetui usus causæ*, are therefore justly deemed parts of it. See Dig. Lib. 19, tit. 1, §§ 14—18; Just. Inst. Lib. 2, tit. 1, § 22 *et seq.* (ed. by Sandars, p. 99 *et seq.*, 6th ed.). The following distinguished commentators define the rules of the Roman Law as to fixtures with much accuracy:—Mackeldey's Comp. Mod. Civ. Law, Gen. Pt. Div. 3, §§ 147, 153, 154; *id.* Spec. Pt. Bk. 1, Ch. 2, tit. 2, § 268; Dr. Warnkönig's Comm. Lib. 1, c. 3, §§ 4, 8; and *Institutiones* by the same learned author; Lib. 2, cap. 2, tit. 3, § 332 *et seq.*; Voet's Comm. ad Pandect. Lib. 41, tit. 1, § 245; Dr. Wood's Inst. Bk. 2, Ch. 3, tit. (Artificial accessions); Taylor's Elements Civ. Law, tit. *Res immobiles*, p. 475 (3rd ed.). For the rules as adopted by the law of Scotland, in regard to fixtures, the following writers may be consulted:—Erskine's Inst. Bk. 2, tit. 2; Bell's Princ. §§ 743, 1470 *et seq.*; Bell's Comm. vol. 1, p. 752, vol. 2, pp. 2, 3; Stair's Inst. Bk. 2, tit. 1, §§ 29 *et seq.*; 39 *et seq.*; Bell's Dict. (by Watson) tit. Fixture; Rankine's Land Ownership, p. 97; and for the decisions, see Shaw's Dig. tit. Heritable or Moveable. For the law as established in America, see Kent's Comm., vol. 2, pp. 342—347. For the Prussian Law of Fixtures, *Pertinenz-stücke* (things appurtenant, or annexed), see Allgemeines Landrecht für die Preussischen Staaten, Erster Theil, Zweiter Titel. §§ 42—108; or the French translation, *Code Général pour les Etats Prussiens*, Première Partie, tit. 2, §§ 42, 77 *et seq.* For the Italian Law, see Cattaneo, Cod. Civ. Ital. Art. 446 *et seq.* The reader will find the rules respecting fixtures not only in the English Law, but in the Civil Law, and the codes of other nations, collected in Burge's Commentaries on Colonial and Foreign Laws, vol. 2, p. 6 *et seq.* See also Story's Conflict of Laws, Ch. 9, § 382 (7th ed.).

of the more refined distinctions which the Courts have established with regard to fixtures should be abolished. Again, it may, perhaps, be deemed expedient, even with respect to the several species of fixtures privileged by the law, that the mere purposes for which they are used should not of themselves be conclusive upon the question of removal. It ought, however, to appear, by plain and determinate rules, what are the particular considerations by which the right of removal may be qualified and restrained. For it is not sufficient that the nature of the exceptions to the general rule is ascertained, if the privilege which these exceptions confer is, in some cases, dependent on collateral circumstances, while the effect and operation of those circumstances is left altogether unsettled.

Lastly, if satisfactory reasons of law and policy can be suggested for admitting a greater relaxation in favour of certain classes of individuals than of others, it ought to be precisely known in what the difference between their respective rights consists. And, indeed, if a definite rule upon this subject were to be laid down, it would tend to remove much of the perplexity which, in the present state of the law, is experienced in respect of the claims of personal representatives ; and would at once put an end to the doubt which now exists, as to the particular cases in which analogical reasoning is admissible, and those in which it fails.

From the preceding examination of the ancient and modern principles of the law relative to the subject of fixtures, it is hoped that the reader will be able to exercise a clearer judgment on the questions about to be discussed in the ensuing pages. The controversies respecting property of this nature, which arose within the city of London

as early as in the fourteenth century, were considered of so much importance, that a particular ordinance was enacted for the adjustment of them (*a*). And in the present day, it cannot fail to be an object of public interest, to determine by wise and intelligible rules, the rights of individuals with respect to a species of possessions, the value of which will always increase in a country, in proportion to the progress of civilisation and refinement.

(*a*) See Appendix (A.), *post*, p. 407.

ERRATA.

Page 21, note (*m*).—For 5 Bell, read 5 D.

70, note (*m*).—For Moore, 17, read Moore, 177.

257, 9th line.—For Woodeson, read Wooddeson.

293, note (*l*).—For 4 Atk. 177, read 1 Atk. 477.

345, note (*z*).—For 7 A. & E. 95, read 7 A. & E. 951.

379, note (*q*).—For Natham *v.* Bowden, read Northam *v.* Bowden.

A Treatise
ON THE
LAW OF FIXTURES.

PART I.
ON THE RIGHT OF PROPERTY IN FIXTURES.

CHAPTER I.

ON THE NATURE OF FIXTURES .. ..	1

THE term *fixtures* is used by writers with various significations; but it is always applied to articles of a personal nature which have been affixed to land. Very frequently no further idea is intended to be conveyed by the term than the simple fact of annexation to the freehold (*a*); and hence have arisen the popular expressions of landlord's fixtures (*b*), and tenant's fixtures; of removable and irremovable fixtures. The name of fixtures is also sometimes applied to things expressly to denote that they *cannot* legally be removed; as where they have been annexed to a house, &c., and the party who has affixed them is not at liberty afterwards to sever and take them away. Thus, it has been said that an article shall fall in with the lease

The term
fixtures.

(*a*) *E. g.*, *Climie v. Wood*, L. R., 3 Ex. at p. 260; *Bain v. Brand*, 1 App. Cas. at p. 772, per Lord Chelmsford.

(*b*) That this is an inaccurate expression, see *Elliott v. Bishop*, 24 L. J., Ex. at

p. 38, per Martin, B., and per Parke, B., at p. 36, where it is pointed out that its only proper signification is that of articles annexed by a landlord, and passing under a demise by him of the premises.

Part I.

to the landlord, or descend to the heir with the inheritance, because it is a fixture.

Fixtures defined.

The term *fixtures*, however, may, it is thought, be most accurately defined as denoting those personal chattels which have been annexed to land so as to become part of it, but which *may* be afterwards severed and removed by the person who has annexed them, or his personal representative, against the will of the owner of the freehold (c). But, it should be observed, that the term has been used by the Courts and amongst text writers without much precision; and it is difficult to determine in which of the above senses it is most frequently employed. On the whole it will be found that, in cases which do not immediately involve the question of removability, the term is generally used as denoting merely articles which, on account of their annexation to the freehold, have ceased to be chattels.

The above definition divides itself into two branches; first, a consideration of what is meant by annexation; secondly, of what is intended by a right of removal against the will of the owner of the freehold (d).

Meaning of annexation.

With respect to the first branch of the definition, it is necessary, in order to constitute a fixture, that the article in question should be let into or united to the land, or to some substance previously connected with the land. It is not enough that it has been laid upon the land, and

(c) Since the adoption of this definition in the first edition of the work, it has been recognized in the following cases:—*Hallen v. Runder*, 1 Cr. M. & R. 266, 276; *Ex parte Reynal*, 2 M., D. & D. 443, 448. Accord. *Ex parte Barclay*, *Re Gawan*, 5 D., M. & G.

403, 410; *Parsons v. Hind*, 14 W. R. 860, 861; *Climie v. Wood*, L. R., 4 Ex. 328, 329; *Boyd v. Shorrocks*, L. R., 5 Eq. 72, 78; *Holland v. Hodgson*, L. R., 7 C. P. 328, 333.

(d) As to the second part of the definition, see *post*, p. 31.

brought into contact with it. The definition requires something more than mere juxtaposition; as, that the soil shall have been displaced for the purpose of receiving the article, or that the chattel should be cemented, or otherwise fastened to some fabric previously attached to the ground (e). Hence there is a numerous class of decisions that may be considered as part of the law of fixtures, the object of which is to determine, whether a thing that has been placed upon the land is actually affixed to it or not. If it is found that, in point of fact, the connection with the soil does not amount to complete annexation, and that the thing is not strictly affixed, it remains in that case, to all intents and purposes, a mere personal chattel, and is in the same situation as any other chattel which has never been brought upon the premises.

The case of *Culling v. Tufnal* (f), tried at Hereford in 1694, before Treby, C. J., affords an early example of this class of decisions; and it is the more remarkable, because it was not till later times, when the doctrine of fixtures came to be better understood, that the decision of the case in question was treated as resting upon the circumstance of incomplete annexation to the freehold, the determination having originally proceeded on a different ground. There the article in dispute was a barn, which was placed upon pattens or blocks of timber lying upon the ground, but not fixed in or to the ground. The explanation which has been given of this case by Lord Ellenborough is, that the party who erected the barn might unquestionably treat it as a mere moveable chattel, because the terms of the statement excluded it from being considered as a fixture: *as it was not fixed in or to the ground* (g).

What not a
sufficient
annexation.

(e) See *Turner v. Cameron*, L. R., 5 Q. B. 306, 311; *Bain v. Brand*, 1 App. Cas. 762, 772. The reader should be apprised, however, that there are certain exceptional cases of *constructive annexation* which will be noticed hereafter, see *post*, p. 20.

(f) Bul. N. P. p. 34.

(g) *Elwes v. Maw*, 3 East, at p. 55.

Part I.

Horn v. Baker,
utensils in
distillery.

In another case (*g*), the property in dispute was the stock of a distiller, which consisted of certain stills set in brick-work, and let into the ground; certain vats, supported by and resting upon brick-work and timber, but which were not fixed in the ground (*h*); and some other vats standing on horses, or frames of wood, which also were not let into the ground, but stood upon the floor. In this case the Court thought that there was a material distinction between the stills that were actually affixed to the ground, and the vats that were placed upon brick-work or frames; these latter they considered to be mere goods and chattels, from the mode in which they were stated to be connected with the premises (*i*).

*Wansbrough
v. Maton*,
barn resting
on staddles.

Again, in *Wansbrough v. Maton* (*j*), a barn built of wood rested on, but was not fastened by mortar or otherwise to the caps of certain blocks of stones called staddles, which were fixed into the ground or let into brick-work; the brick-work being in part built in and let into the ground. The barn rested on the foundation by its own weight alone. It was held that such an erection was not united to the freehold and formed no part of it, and was not therefore a fixture (*k*). So, too, it has been held that metal plates laid upon the surface of the ground in an iron rolling mill as a flooring, and "straightening plates" used in the mill and laid in the same manner, are not fixtures (*l*); although if such articles are fitted into the ground

Metal floor-
ing-plates,
tram-plates,
&c.

(*g*) *Horn v. Baker*, 9 East, 215.

(*h*) See the remarks on this case in *Ex parte Reynal*, 2 M., D. & D. 443, 454.

(*i*) Accord. *Chidley v. West Ham*, 32 L. T. 486.

(*j*) 4 A. & E. 884.

(*k*) See also *Wiltshear v. Cottrell*, 1 E. & B. 674; *Naylor v. Collinge*, 1 Taunt. at p. 21. See, too, the instance

of a post-windmill in *R. v. Londonthorpe*, 6 T. R. 377; of a windmill resting on a brick foundation, *R. v. Otley*, 1 B. & Ad. 161; of window-sashes, *R. v. Hedges*, 1 Leach, C. C. 201; of a cistern, *Mather v. Fraser*, 2 K. & J. 536, 559. As to constructive annexation, see *post*, p. 20.

(*l*) *Metrop. Counties, &c., Society v. Brown*, 26 Beav.

and overlaid with the permanent floor they do become fixtures (*m*). Decisions to the like effect are not wanting; as in the case of a steam winch bolted to a heavy stone which lay upon the floor of a building but was not attached to it (*n*); and of tram-plates fastened to sleepers laid upon the surface of the ground (*o*). In both these cases it was held that the articles were mere chattels.

It follows from what has been already said, that where an article is not actually affixed to the soil, the mere fact that it is placed upon a foundation or in a receptacle which has been prepared for it, is not sufficient to make it a fixture. In *Ex parte Astbury* (*p*), the Court had to consider this point with reference to certain weighing machines placed in holes in the ground faced with brick-work, and resting at the bottom of the holes but not fixed in any way thereto, there being a space of half an inch or more between the machines and the sides of the holes. It was held by Giffard, L. J., that the preparation of the soil did not make the machines fixtures (*q*).

*Ex parte
Astbury,
weighing
machines.*

454. The Court remarked that the fact that a portion of the plates accidentally penetrated the ground for a few inches, did not make them fixtures; as to which see *Wood v. Hewett*, 8 Q. B. 913, 919; *Huntley v. Russell*, 13 Q. B. 572, 577, note; *Duke of Beaufort v. Bates*, 3 D. F. & J. 381.

(*m*) *Ex parte Astbury*, L. R., 4 Ch. 630, 637.

(*n*) *Irish, &c. Building Society v. Mahony*, Ir. R., 10 C. L. 363, 369.

(*o*) *Duke of Beaufort v. Bates*, 3 D. F. & J. 381. It may be otherwise if the sleepers are laid in the soil or

in ballast, *Turner v. Cameron*, L. R., 5 Q. B. 306; *The Patent Peat Co.*, 17 L. T. 69; *Ex parte Moore and Robinson's &c. Co.*, 14 Ch. D. 379; *Brand's Trustees v. Brand's Trustees*, 5 R. 607.

(*p*) L. R., 4 Ch. 630, 637.

(*q*) See, too, *Hutchinson v. Kay*, 23 Beav. 413; *Metropolitan Counties, &c. Society v. Brown*, 26 Beav. 454. So, if there were a foundation of granite for a cannon or a large telescope, neither the cannon nor the telescope would necessarily be a fixture, *Ex parte Astbury*, L. R., 4 Ch. at p. 639. And see *Tod's Trustees v. Finlay*, 10 M. 422.

Part I.

What constitutes complete annexation, a question of fact dependent upon—

It is evident from the foregoing cases that to constitute annexation, the connection between the article and the soil must be of a more intimate character than that established by mere juxtaposition, however ponderous the article may be. But it remains to be seen what connection with the soil (*r*) will constitute such a complete annexation as to make an article a fixture. This is a question of fact depending upon the circumstances of each case, and principally upon two considerations; first, the mode of annexation to the soil, and whether the article can be removed *integre, salve et commode*, or not, without injury to itself or to that to which it is annexed; secondly, the object of the annexation, and whether it be for a permanent purpose, or merely for a temporary purpose and the more complete enjoyment of the article as a chattel (*s*).

(A.) Degree of annexation.

As regards the first consideration—viz., the degree of annexation,—it is obvious that where an article is so firmly attached to the land that its removal necessarily involves its destruction, it has lost its character as a chattel and has become a part of that to which it is affixed; as, for instance, paper pasted on the walls of a room (*t*). So also, if the article affixed has been so incorporated with that to which it is attached as to become an integral portion of the latter, from which it can only be separated by a process of disintegration; as, for instance, the bricks composing a building (*u*). And unless an article annexed to the soil

(*r*) It must be understood that when connection with the soil is spoken of in the text, connection with something which is itself so attached to the soil as to form a part of it is included.

(*s*) *Hellawell v. Eastwood*, 6 Exch. 295, 312; *Elliott v. Bishop*, 10 Exch. at pp. 508, 520 (reversed on another point, 11 Exch. 113); *Waterfall v. Penistone*, 6 E. & B.

876, 889; *Parsons v. Hind*, 14 W. R. 860, 861; *R. v. Lee*, L. R., 1 Q. B. 241, 254; *Turner v. Cameron*, L. R., 5 Q. B. 306, 313; *Holland v. Hodgson*, L. R., 7 C. P. 328, 336; *Chidley v. West Ham*, 32 L. T. 486, 488.

(*t*) *D'Eyncourt v. Gregory*, L. R., 3 Eq. 382, 390.

(*u*) *Parsons v. Hind*, 14 W. R. at p. 861; *Whitehead v. Bennett*, 27 L. J., Ch. 474.

can be removed without material injury to itself or to that to which it is annexed, its physical attachment is sufficient in itself, independently of any other consideration, to show that it has ceased to be a chattel.

The second consideration, however, viz., that of the object and purpose of the annexation, is almost, if not quite, as important as the first. For although the degree of annexation may be so slight that the article can be removed *integre, salve et commode*, still, if it be annexed to the soil for a permanent purpose, it becomes a fixture, however slightly it may be affixed (*x*). In general, therefore, where an article is found to be annexed, it becomes necessary to inquire with what object it was so annexed, as even in the case of a slight annexation an article will cease to be a chattel unless that object be temporary (*y*). (B.) Object of annexation.

In some cases the very nature of the articles shows that they are only fastened as chattels temporarily. Thus, in Nature of article sometimes shows it is chattel.

(*x*) It was resolved in *Warner v. Fleetwood* (Mich. 41 & 42 Eliz. in C. B., *per tot. cur.*), that wainscot is part of the house, and "there is no difference in law if it be fastened by great nails or little nails, or by screws or irons put through the post or walls (as had been invented of late time)." See *Herlakenden's case*, 4 Co. 64 a.

(*y*) "The mere possibility, or even facility, of removal certainly does not decide the question. What are more removable than the doors and windows of a house? Still there is fixture enough to let the other principles of destination, and of convenience for the enjoyment of the land, operate. It appears to me that the conservatory in a

" proprietor's garden, though
" it could be taken away and
" put down elsewhere with
" the most perfect ease in a
" couple of days; or even a
" garden seat sunk a foot
" into the earth, a wooden
" bridge laid across a brook,
" a wooden porch over the
" door, though only attached
" by a single nail, or a
" verandah hanging from a
" hook outside of a window,
" though all capable of being
" lifted up and taken away
" without the slightest injury,
" almost by a single hand,
" all descend to the heir"
(*i. e.*, form a part of the realty, and are not mere chattels). Per Lord Cockburn in *Dixon v. Fisher*, 5 D. at p. 796; affirmed in H. L., 12 Cl. & F. 312.

Part I.

Carpet,
pictures, &c.Secus, if
picture placed
in panel.

the case of a carpet tacked to the floor for the purpose of keeping it stretched, it would be absurd to call that a fixture which is easily removable and, as a matter of fact, repeatedly removed (s). The same remark applies to mirrors or pictures, attached by screws or nails in the ordinary way to the walls of a house, or even fixed by metallic bolts (a); also to bookcases fastened to the walls by screws or nails (b); so, too, a clock, though firmly fixed to the wall of a room, may remain a chattel (c). Again, the anchor of a ship, which must be firmly fixed in the ground in order to bear the strain of the cable, is not a fixture (d), and the same may be said of a tent (e). But it is otherwise if pictures or mirrors are placed in panels so as to form an integral portion of the entire covering of the walls. In such a case, though they may be easily removed, yet, as their removal would necessitate the substitution of some other article in their place, the covering of the walls would be incomplete without them. They are not affixed merely for their better display as ornaments,

(z) *Boyd v. Shorrocks*, L. R., 5 Eq. at p. 79; *Hellawell v. Eastwood*, 6 Exch. at p. 313; *Hutchinson v. Kay*, 23 Beav. at p. 417; *Haley v. Hammersley*, 3 D., F. & J. at p. 592; *Holland v. Hodgson*, L. R., 7 C. P. at p. 335.

(a) *Birch v. Dawson*, 2 A. & E. 37; *Hellawell v. Eastwood*, *supra*; *Haley v. Hammersley*, *supra*; *R. v. Lee*, L. R., 1 Q. B. at p. 254; *Climie v. Wood*, L. R., 4 Ex. at p. 329; *D'Eyncourt v. Gregory*, L. R., 3 Eq. 382, 396.

(b) *Birch v. Dawson*, *supra*. In *Lady St. John v. Piott* (2 Bulst. 102), it was said that shelves were parcel of the house.

(c) *Part*

W. R. at p. 861.

(d) *Holland v. Hodgson*, *supra*. Secus, in the case of the anchor of a suspension bridge (*Ibid.*), or of permanent moorings, *Cory v. Bristow*, 2 App. Cas. 262.

(e) *Patent Peat Co.*, 17 L. T. 69. That hop-poles are not to be considered a part of the realty, see Gilb. Evid. p. 261. And see *Ex parte Sir W. Hart Dyke*, 22 Ch. D. 410. Secus, in America, *Bishop v. Bishop*, 1 Vernon (N. Y. Rep.) 123; *Sullivan v. Toole*, 33 Hun, (N. Y. Rep.) 203. In Canada it has been held that hop-poles left standing in the ground are not distrainable, *Allway v. Anderson*, Upper Canada Rep., 5 Q. B. 34.

but they also constitute a part of the wall itself (*f*). So, too, an organ fixed in a recess expressly made for it may cease to be a chattel (*g*).

Chap. I.

In less simple cases, however, it is not always easy to determine whether an article is to be looked upon as retaining its character as a chattel. It is proposed, therefore, to notice some of the principal decisions on the point under consideration, as tending to show the construction placed by the Courts upon the words "temporary" and "permanent" with reference to the object and purpose of annexation. It must, however, be borne in mind that the question of fixture or no fixture being one of fact, each decision is necessarily dependent on its own particular circumstances.

Decisions in less simple cases.

In *Davis v. Jones* (*h*) the property in dispute consisted of pieces of machinery called jibs, the description of which was as follows:—Certain caps and steps of timber were fixed into a building and the jibs were placed in these caps or steps, and were the uprights that turned round the work in the caps and steps. They were fastened by pins above and below, and might be taken in and out of the caps or steps without injuring them or the buildings; but could not be removed without being a little injured themselves. It was stated in the special case that jibs of this description were usually valued between outgoing and incoming tenants. The Court of King's Bench, on this occasion, thought that the question before them depended upon a conclusion of fact, to be drawn from the matters stated in the case, and not upon any point of law; and

Davis v. Jones, jibs placed in steps.

(*f*) *D'Eyncourt v. Gregory*, L. R., 3 Eq. 382. The distinction is also well shown in *McKeage v. Hanover Insurance Co.*, 37 Am. Rep. 471; and *Ward v. Kilpatrick*, *ib.*, note. *Semble*, a picture used as the

sign-board of an inn is a fixture, *Ex parte Willoughby d'Eresby*, *In re Thomas*, 29 W. R. 527.

(*g*) *Rogers v. Crow*, 40 Missouri, 91.

(*h*) 2 B. & Ald. 165.

Part I.

they were of opinion, looking to the mode of construction and to the practice of valuation (taking such practice as an explanation of their nature and character), that these jibs were not properly fixtures at all, but mere personal chattels. Although it is thought well to notice this case as having been frequently cited as an authority, it seems difficult to regard it as being rightly decided, when viewed by the light of later decisions; for, in the first place, the jibs appear to have been parts of an entire machine fastened to other parts, which are stated to have been permanently fixed to the freehold (*i*); and, secondly, the custom relied upon would seem to have been quite consistent with the fact of the jibs being fixtures, the valuation of fixtures between outgoing and incoming tenants being a very common practice (*k*).

Hellawell v. Eastwood, spinning machines.

In *Hellawell v. Eastwood* (*l*), the question was whether certain cotton spinning machines, called mules, were fixtures, or mere chattels, and, therefore, distrainable (*m*). The machines in question were put up by the tenant of a mill, and were fixed by screws, some to the wooden floor and some into holes in the stone flooring, being secured therein by molten lead. In this case, the Court of Exchequer said that the question to be determined was one of fact, depending principally upon the two considerations already mentioned; and they held *as a fact* that the machines, being attached slightly and capable of removal without the least injury to the fabric of the building or to themselves, and the object and purpose of the annexation having been not to improve the inheritance, but merely

(*i*) As to which, see *post*, p. 21.

(*k*) As to custom generally, see *post*, p. 67 *et seq.* In *Wilde v. Waters* (24 L. J., C. P. 193, 194), a doubt was expressed

as to this case being good law.

(*l*) 6 Exch. 295. And see *Skinner v. Harman*, 3 Ir. C. L. R. 243; *The Patent Peat Co.*, 17 L. T. 69.

(*m*) As to distress, see *post*, p. 386.

to render the machines steadier and more capable of convenient use as chattels, they never ceased to have that character, and were, therefore, liable to distress (*n*).

In *Parsons v. Hind* (*o*), the Court of Queen's Bench held, that an hydraulic press, which, although it was fixed in a factory by mortar (*p*), was removable without any real injury to the inheritance, was not so annexed as to become a fixture, but remained a chattel. The Court, adopting and applying the principles laid down in *Hellawell v. Eastwood*, found as a fact, that the object of the annexation was not the permanent improvement of the inheritance, but that the press was a mere additional convenience, not essential to the carrying on of the factory works, and brought into the factory for temporary uses, and that it was therefore clearly a chattel (*q*).

Parsons v. Hind, hydraulic press.

(*n*) It was said by Lord Lyndhurst, C. B., in *Trappes v. Harter*, 2 Cr. & M. at p. 177, that the screwing of a stocking-frame to the floor to keep it steady would not make it a fixture. But this dictum, which was obiter, was much doubted in several cases; see *Minshall v. Lloyd*, 2 M. & W. at p. 456, per Parke, B.; *Wilde v. Waters*, 24 L. J., C. P. at p. 194, per Cresswell, J.; and it cannot be supported in the face of the decision in *Holland v. Hodgson*, L. R., 7 C. P. 328; *post*, p. 15.

(*o*) 14 W. R. 860.

(*p*) But see, as to this, *Holland v. Hodgson*, as reported 41 L. J., C. P. 146, per Blackburn, J. See generally, as to annexations by mortar, Yr. Bk. 20 Hen. 7, p. 13; *Lawton v. Salmon*, 1 H. Bl. 260, *in notis*; *R. v. Otley*,

1 B. & Ad. 161; *West v. Blakeway*, 2 M. & G. 729, 757; *Metropolitan Counties, &c. Society v. Brown*, 26 Beav. 454; *Cross v. Barnes*, 46 L. J., Q. B. D. 479; *post*, p. 15. Compare *Syme v. Harvey*, 24 D. 202, *post*, p. 103; *Nisbet v. Mitchell-Innes*, 7 R. 575, *post*, p. 23.

(*q*) It is important to observe that there is a material distinction between the two foregoing cases, inasmuch as in *Hellawell v. Eastwood* the mules were necessary to the use of the premises for the purpose for which they were occupied, whilst the Court, in *Parsons v. Hind*, expressly found that this was not so with reference to the hydraulic press. The decision in the former case, therefore, went considerably further than that in the latter.

Part I.

Walmsley v. Milne, steam engine and boiler.

In *Walmsley v. Milne* (q), the Court of Common Pleas, after refusing to express any opinion on the case of *Hellawell v. Eastwood*, held that a steam-engine and boiler, a hay cutter, and other articles annexed to the freehold by the owner in fee, for the purposes of his trade, were fixtures. In this case the articles were screwed or attached by bolts or nuts, and could be removed without injury to the building or to themselves; but the Court were of opinion that they were all firmly annexed for the purpose of improving the inheritance, and not for any temporary purpose.

Mather v. Fraser, machinery affixed by quasi permanent means.

In *Mather v. Fraser* (r), Page Wood, V.-C., held that a mortgage of a mill by the owners in fee, who carried on the business of copper roller manufacturers, by which the mortgagors purported to convey all fixtures, passed all such of the machinery and articles on the premises in question as were affixed to the freehold, whether by screws, solder or any other *quasi permanent* means, or by being let into the soil. The learned judge further held that, even assuming it to be possible to distinguish between the case of machinery placed upon land for the purpose of trade

(q) 7 C. B., N. S. 115. And see *Wilde v. Waters*, 16 C. B. 637, where it was held that a ladder, which was the only means of access to an upper room, and was fixed to the floor below and a beam above, a crane nailed to the roof and floor, and a bench nailed to the wall, were fixtures.

(r) 2 K. & J. 536, following *Ex parte Barclay, Re Gawan*, 5 D., M. & G. 403. See, also, the case of a threshing machine, *Wiltshier v. Cottrell*, 1 E. & B. 674; of an engine and boiler, *Climie v. Wood*, L. R. 10, 328; of looms,

Re Dawson, Tate & Co., Ir. R., 2 Eq. 218; of machinery, *Irish, &c. Building Society v. Mahony*, Ir. R., 10 C. L. 363; and *Brand's Trustees v. Brand's Trustees*, 5 R. 607. That gas fittings are fixtures, see *Wilde v. Waters*, *supra*; *Sewell v. Angerstein*, 18 L. T. 300. Though in Scotland they have been held to be mere chattels, see *Nisbet v. Mitchell-Innes*, 7 R. 575; and the weight of authority in America seems to be to the same effect, *Smith v. Commonwealth*, 29 Am. Rep. 402 (note, p. 403). See, however, *Fratt v. Whittier*, 41 Am. Rep. 251.

and manufacture as collateral to and independent of the use and enjoyment of the land itself, and that of machinery placed upon the land for the purpose of better and more profitably enjoying the land (s), it was with the latter view that the articles in question had been placed upon the mortgaged premises. The Vice-Chancellor in this case expressed disapproval of the decision in *Hellawell v. Eastwood*, though he attempted, under a slight misapprehension as to the law of distress (t); to show that it might be supported on other grounds.

The same learned judge again decided in *Boyd v. Shorrock* (u), that looms in a cotton mill, fastened by nails driven through the loom-feet into wooden plugs fitted into the stone pavement, passed as fixtures under a mortgage of the premises by a tenant. The grounds of the decision were, that it was the primary intention that the looms should remain so affixed during the interest of the tenant, and that the fact that extraordinary circumstances might arise rendering it desirable to remove and affix them to another part of the building, did not make the purpose of the annexation less permanent (x).

The foregoing cases were considered by the Court of Queen's Bench in *Longbottom v. Berry* (y) with reference to certain machines set up in a cloth mill and affixed thereto by screws, bolts or solder by the owner in fee, who had mortgaged the premises. It was contended on behalf of the plaintiff, on the authority of *Hellawell v. Eastwood*, that, looking to the mode of annexation and to the fact that

(s) As to which, see *post*, p. 229.

(t) See *Walmsley v. Milne*, 7 C. B., N. S. at p. 129; *Holland v. Hodgson*, L. R., 7 C. P. at p. 338. And see *post*, p. 388.

(u) L. R., 5 Eq. 72.

(x) The Vice-Chancellor refused to admit evidence of a custom to regard the machinery as personal chattels. As to this, see *post*, p. 25.

(y) L. R., 5 Q. B. 123. And see *Turner v. Cameron*, *id.* p. 306.

Boyd v. Shorrock, looms.

Longbottom v. Berry, machinery in cloth mill.

Part I.

cumstances, the purpose and time for which the engine was intended to be used were of a *quasi permanent* character, and that the engine was, therefore, a fixture.

*Chidley v.
West Ham,
utensils in
distillery.*

The only other case which it is thought necessary to mention here is that of *Chidley v. The Churchwardens of West Ham* (c). There the question was whether certain utensils in a distillery were rateable as being fixtures (d). Some of these were screwed down, and some attached to pipes, which again were fastened to steam engines or to articles which were clearly fixtures. A further question arose as to two pumps fastened by bolts through the walls to iron plates on the other side. The special case stated that all these articles were necessary in the process of distilling, but were capable of being easily disconnected, and that each of them before being connected was a separate and complete article in itself, known in the trade as such; the case also stated that all of them were bought and sold as separate and complete articles, and that most of them were bought and sold secondhand as well as new. The Court held that the articles in question were chattels. Blackburn, J., in the course of his judgment said: The question "depends, as is stated in *Holland v. Hodgson* " (*supra*), on whether they are annexed to the freehold; " and if they are annexed in a certain sense, with what " intent they were so annexed. Applying these rules it " appears by the case that all the articles are chattels well " known in the trade, and sold separately, both as new and " secondhand. They are not attached to the premises, " except in the sense that the weight of the article keeps " it steady, and though one or two are screwed down and " some attached to pipes, which again are attached to " steam engines, or to what are clearly fixtures, this alone " will not make them fixtures. I thought at first that the " two pumps were annexed to the freehold, but with some

Judgment of
Blackburn, J.

(c) 32 L. T. 486.

(d) As to rateability of fixtures, see *post*, p. 338.

“hesitation, I now think that they are not so annexed as to
 “come within the rule. They are bought as independent
 “chattels, and though screwed down while used, still they
 “can easily be unscrewed and again sold as chattels; and
 “as the rest of the Court clearly hold they are not an-
 “nexed to the freehold I agree with them.” Lush, J., in
 assenting, said, “These cases are always difficult, owing
 “to the things being often almost, and yet not entirely,
 “fixtures. . . . I do not think, from the description
 “given of the works, that they are so annexed as to become
 “part of the soil. As to the pump (*sic*) I think it is not
 “fixed, and that as it is capable of being sold again, and
 “is fixed merely to steady it, it cannot be treated as a
 “fixture.”

In every view this case presents difficulties. The Court appear to have treated all the articles upon exactly the same footing, whereas there seems to have been a considerable difference in the degree of annexation between the utensils and the pumps. In accordance with the decision in *Longbottom v. Berry*, as to the “washer” (*e*), it would seem that the physical annexation of these utensils was incomplete, and they might on that ground be said to be chattels. With regard to the pumps, however, the description would seem to show that they were clearly annexed physically, and certainly as much so as the looms in *Holland v. Hodgson*. It must be presumed, therefore, that as regards the pumps, at any rate, the *ratio decidendi* was that the annexation was for a temporary purpose; and this inference appears to have been drawn from the statement in the case, that all the things were frequently bought and sold separately, both new and second-hand. But this could surely have been said of the looms in *Holland v. Hodgson* and the earlier cases, and the fact that they were capable of being so bought and sold would not,

Decision in
Chidley v.
West Ham
 considered.

(*e*) *Ante*, p. 14.

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in itself, negative the inference that they were attached for the purpose of carrying on the trade; and that it was intended that they should remain fixed during the interest of the appellant. Moreover, it is to be noticed that in *Grymes v. Boiceren* (e), it was decided that pumps attached in a very similar way were fixtures. As regards the pumps, therefore, as to which it is to be noticed that Blackburn, J., expressed some doubt, it is submitted the decision is questionable.

Difficulty of
laying down
any general
rule.

Decision in
Hellawell v.
Eastwood
considered.

On a consideration of the authorities referred to in the preceding pages on the subject of annexation, it will be seen how very difficult, if not impossible, it is to lay down any general rule as to what constitutes an annexation sufficient to make an article a fixture. In almost all the cases on the subject the decision in *Hellawell v. Eastwood* has been quoted, and in the majority it has been unfavourably criticised, though the principles of law there laid down have been admitted to be correct. It is submitted that, according to the tendency of later judicial opinion, the Court of Exchequer did not in that case sufficiently take into consideration the fact, that though the immediate purpose with which the "mules" were fixed was to render them steadier, yet, as the result of the annexation was to put the premises to a more profitable use for the purposes to which they were applied, they were annexed for an object sufficiently permanent to make them part of the land. It is difficult to see what was the meaning attached by the Court in that case to the words "for the improvement of the inheritance." It follows from the definition of "fixtures" given above (f), that in one sense all fixtures may be said to be affixed for a purpose only temporary, seeing that their removal is contemplated at some period. It cannot be supposed, however, that the Court considered that tenant's fixtures, *i. e.*

fixtures removable by a tenant, were not part of the soil, and yet it is plain that the object of annexation by a tenant is not to improve the landlord's reversion. The only possible explanation seems to be that the Court of Exchequer would have thought that such fixtures were for the improvement of the inheritance, in the sense that if not previously severed they pass with the demised premises to the landlord at the expiration of the term.

But be this as it may, it is now settled beyond dispute, that when the object and purpose with which an article has been affixed, are considered as a test whether the article has or has not ceased to be a chattel, they must be regarded in relation to the interest in the land of the person affixing the article, which interest, as in the case of a tenant, may itself be temporary; and that if it appears that a chattel has been annexed with the intention of its remaining affixed during the continuance of that interest, the purpose of the annexation cannot be considered merely temporary (g). There can be little doubt, therefore, that in circumstances similar to those in *Hellawell v. Eastwood*, the machines in question would now be considered fixtures.

Object of annexation must be looked at in relation to interest of person annexing.

The authorities on this subject seem to lead to the conclusion that where articles are in any way annexed to the realty, with a view to its better enjoyment during the interest of the person annexing them, they become fixtures, whether that person be the owner of an estate of inheritance, for life, or merely for a term of years. It is submitted, therefore, that, in inquiring whether a given article is a fixture or a chattel, the extent of the interest of the person annexing it is immaterial, the question being what was the object and purpose of the annexation as

Result of authorities.

(g) *Boyd v. Shorrocks*, L. R., 7 5 Eq. 72, 78; *Turner v. Cameron*, L. R., 5 Q. B. 306, 312; *Holland v. Hodgson*, L. R., 7 C. P. 328, 336; *Chidley v. West Ham*, 32 L. T. 486, 488.

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evidenced by the use to which the article was, in fact, applied. There seems, however, to have been some confusion in the cases on this point, owing, it is thought, to the fact that the distinction between questions of this nature, and those as to the right of removal of articles admitted to be fixtures, has not been sufficiently observed (*h*). In the latter case, as will be seen hereafter, it is necessarily important to consider the nature of the interest in the realty of the person who has made the annexation.

Constructive annexation.

It remains to notice those exceptional cases of what is called constructive annexation, in which, in certain circumstances, things are by construction of law considered to be annexed to the realty, although in fact they are not so (*i*). These cases are based on the maxim *res accessoria sequitur rem principalem*, upon which principle where articles, though in themselves unattached and mere chattels, are accessory to the realty, or essential parts of something which is itself a part of the realty, they are considered to be constructively annexed to it.

Locks and keys, &c.

Thus, locks and keys, windows or doors hanging or serving to a house, although they may be distinct things, are considered to be annexed to the house to which they belong (*k*). Similarly, a millstone removed for the temporary purpose of picking, remains parcel of the mill (*l*).

(*h*) See per Kindersley, V.-C., in *Gibson v. Hammer-smith R. Co.*, 32 L. J., Ch. 337, 342.

(*i*) They do not, however, acquire all the incidents of realty; for example, trover may be brought for them like other chattels.

(*k*) *Pyot v. Lady St. John*, Cro. Jac. 329; *Sheppard's Touchstone*, 470; *Liford's* 11 Co. 50 b; *Bishop v.*

Elliott, 11 Exch. at p. 119; *Moody v. Steggles*, 12 Ch. D. 261, 267; and see *post*, pp. 277, 388.

(*l*) *Place v. Fagg*, 4 M. & R. 277; *Walmsley v. Milne*, 7 C. B., N. S. 115; *Sewell v. Angerstein*, 18 L. T. 300; *Metrop. Counties, &c. Society v. Brown*, 26 Beav. 454, 459; *Wadleigh v. Janvrin*, 41 New Hampshire, 504, 511. So in the Digest, Lib. XIX. tit. 1, 17,

Again, where machinery is attached to the realty, all those loose articles which, though not physically attached to the fixed machinery, are yet necessary for the working thereof, are in contemplation of law attached to the realty; provided they be constructed and fitted so as to form parts of the particular machinery, and are not equally capable of being applied in their existing state to other machinery of the kind (*m*). And even duplicate parts will be considered part and parcel of the machine for which they are intended. For although the machine may be a perfect machine without them, it is a more perfect machine with them. This will not be so, however, if they have never been used in the machine, and it is necessary that something more be done to fit them to it before they are ready for use (*n*).

Unattached
and duplicate
parts of fixed
machinery.

Upon the same principle where circumstances are such as to show that articles, though retained in position by their own weight only, were intended to be part of the land, they do become part of it. A simple instance of this class is afforded in the case of a dry stone wall, in which the blocks of stone are placed one upon the top of another without mortar or cement. In this case, though each block of stone is *de facto* an independent chattel, the law considers it to be constructively annexed to the soil on which the wall, of which it forms an integral part, is placed. The same stones, however, if stacked for convenience in a similar way in a builder's yard would remain chattels, for in this

Stones com-
posing dry
stone wall.

§ 10, "Ea quæ ex ædificio detracta sunt ut reponantur ædificii sunt." And see the section on Heirlooms, &c., *post*, p. 249.

(*m*) *Dixon v. Fisher*, 5 Bell, 775, 801; *S. C.* in H. L., 12 Cl. & F. 312, 330, and *post*, pp. 232, 241; *Mather v. Fraser*, 2 K. & J. 536, 559; *Whitehead v. Bennett*, 27 L. J., Ch.

at p. 475; *Bain v. Brand*, 1 App. Cas. 762, 764.

(*n*) *Ex parte Astbury*, L. R., 4 Ch. 630, 634. And see *Voorhis v. Freeman*, 2 Watts & Sergeant (U. S. Rep.), 116, 120; *Wadleigh v. Janvrin*, 41 New Hampshire, 504; *Burnside v. Twitchell*, 43 New Hampshire, 390.

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case it is obvious that they are so placed for a purpose strictly temporary (o).

Statues,
vases, &c.

*D'Eyncourt v.
Gregory.*

A question of greater nicety occurs in the case of statues, vases, &c. placed in the vicinity of a building and resting by their own weight alone. It was held by Lord Romilly, M.R., in *D'Eyncourt v. Gregory* (p), that, if these are strictly and properly part of the architectural design of a building, and put there as such, as distinguished from mere ornaments afterwards added, they will be considered as constructively annexed, and, therefore, a part of the freehold. His Lordship remarked that the distinction no doubt was a very fine one, but that he was unable to suggest any other mode of determination.

*Snedeker v.
Warring.*

There seems to be no other reported decision on the point in England. In America, prior to the decision in the last case, the Court of Appeal at New York had to consider the point in the case of *Snedeker v. Warring* (q). There A., a sculptor, being the owner of a farm, mortgaged it to B. Subsequently A. erected upon the farm a dwelling-house of red sandstone, and also placed upon the lawn in front of the house a colossal statue of his own workmanship. The statue was also of red sandstone, and stood upon a prepared base of the same material, to which, however, it was in no way attached, its own weight being sufficient to keep it in position. The majority of the Court, following the distinction laid down by the civil law between articles placed *ad integrandam domum* and such as are placed *ad instruendam domum*, held that the

(o) *Holland v. Hodgson*, L. R., 7 C. P. at p. 335.

(p) L. R., 3 Eq. 382.

(q) 2 Kernan, 170. And see *Wadleigh v. Janvrin*, 41 New Hampshire, 504. For instances in which "frame buildings" placed upon blocks

simply laid upon the ground, have in America been held to form part of the realty, see *Central Branch Railroad Co. v. Fritz*, 27 Am. Rep. 175; *State Savings Bank v. Kircheval*, *id.* 310.

statue was part of the land and, as such, passed to B. under the mortgage. The grounds given for the decision were that the statue was peculiarly fitted as an ornament for the ground in front of the house, and that it was of colossal size and not adapted to any other destination, and that the design and position of the statue were in every respect appropriate, in good taste, and in harmony with the surrounding objects and circumstances. In Scotland it has been held (*r*) that stone lions standing *in the grounds of a house and bedded in stucco*, and fire clay vases placed on the tops of a stone parapet wall and on stone pedestals, and attached thereto by stucco or cement, did not lose their character as chattels. It was found that the mode of attachment was merely what was necessary to prevent them from being blown or knocked over, and that the vases formed no part of the design of the house, as the stone work was complete in itself and so constructed as to produce a proper architectural effect without them. This case is in strong contrast to that of *D'Eyncourt v. Gregory*, for the fact that the articles formed no part of the architectural design, but were in fact excrescences, was considered to outweigh even the circumstance of slight physical annexation.

Nisbet v. Mitchell-Innes.

It is to be observed that in *D'Eyncourt v. Gregory* and *Snedeker v. Warring* the articles were part of the original architectural design, whereas this was expressly found not to be the case in *Nisbet v. Mitchell-Innes*. It may, however, be still open to doubt whether an article, though subsequently added by way of ornament, may not, by special adaptation to the adornment of the house, become an integral part of it, though not forming part of the original architectural design (*s*).

(*r*) *Nisbet v. Mitchell-Innes*, 7 R. 575. *Miln*, 1 R. 1180. For the provisions of the French law,

(*s*) See further *Dowall v.* see Code Napoléon, Liv. II.

Part I.

Onus of proof
in questions of
annexation.

It will have been seen that in all cases the question of whether a chattel has become a fixture is one of evidence, and dependent upon the particular circumstances of each case; it is, therefore, important to see upon whom the onus of proof is thrown. On this point the following remarks of Blackburn, J., in delivering the judgment of the Court in *Holland v. Hodgson* (*t*), are most pertinent:—
 “ Perhaps the true rule is, that articles not otherwise at-
 “ tached to the land than by their own weight are not to
 “ be considered as part of the land, unless the circum-
 “ stances are such as to show that they were intended to
 “ be part of the land, the onus of showing that they were
 “ so intended lying on those who assert that they have
 “ ceased to be chattels, and that, on the contrary, an article
 “ which is affixed to the land even slightly is to be con-
 “ sidered as part of the land, unless the circumstances are
 “ such as to show that it was intended all along to continue
 “ a chattel, the onus lying on those who contend that it is
 “ a chattel.”

Evidence of
usage to show
that article is
a chattel.

Before leaving this part of our subject, it may be well to allude to the admissibility and effect of evidence of custom or usage of trade, as tending to show that a particular article is a fixture or a chattel. In *Davis v. Jones*, already referred to (*u*), the Court of King's Bench, in deciding that certain “jibs” were mere chattels, gave some weight to a statement in the special case that articles of that nature were usually valued between outgoing and incoming tenants. Abbott, C. J., in giving the judgment of the Court, said that taking the practice (*i. e.* usage) as an explanation of the nature and character of the articles, they were to be considered as personal chattels. It is submitted

Art. 525; Cours de Code Na-
 poléon (Demolombe), vol. 9,
 p. 164. See also for the pro-
 visions of the Civil Law, Pan-
 der' tit. 1 (by

Pothier); Corp. Jur. Civ.
 (Krueger), Lib. XIX. tit. 1,
 art. 17.

(*t*) L. R., 7 C. P. at p. 335.

(*u*) *Ante*, p. 9.

with diffidence that the usage stated did not justify the inference thus deduced from it, viz. that the jibs were not fixtures, and that the usage merely went to show that the jibs were removable as between landlord and tenant, that is, that they were fixtures properly so called (*x*).

It would seem that this statement only properly carried weight as affording some evidence of the slight extent of the physical annexation of the jibs. It was in this latter sense that somewhat similar statements of usage were received in the case of *Chidley v. The Churchwardens of West Ham* (*y*), where it was stated that the articles in dispute, before being connected with the soil, were separate and complete articles, known in the trade as such and frequently bought and sold second-hand as well as new. In *Boyd v. Shorrocks* (*z*) the question was whether, as between mortgagees and assignees of the mortgagor's creditors, a mortgage deed passing certain looms fixed in a mill needed registration under the Bills of Sale Act, 1854 (*a*). It was contended on behalf of the assignees, that by the custom of trade in the district such looms were not regarded as fixtures, but as merely personal chattels; but Wood, V.-C., refused to admit evidence of such a custom. The view taken by the learned judge seems to have been that the deed expressly passing all looms and other machinery, whether "fixed or moveable," those words were plainly sufficient to include the looms in question, whether they were to be regarded as fixtures or chattels; and that, therefore, the only question was whether they were in fact fixtures, in which case the mortgagees were entitled to them, although the mortgage had not been registered. The effect of evidence of usage of trade being only to raise a presumption that parties have contracted with reference

Effect of
usage of
trade.

(*x*) See *Grymes v. Boweren*, 6 Bing. 437, 439.

(*y*) *Ante*, p. 16.

(*z*) L. R., 5 Eq. 72; *ante*, p. 13.

(*a*) As to bills of sale now, see *post*, pp. 281, 304.

Part I.

to it (b), such evidence was in this case inadmissible, because the assignees were precluded by the express words of the contract from making use of it for the only purpose for which it was admissible, namely, to show that the looms did not pass under the mortgage. The real point in the case was whether a mortgage comprising such looms required registration, and that must necessarily be decided entirely independently of any contract between the mortgagors and mortgagees. Therefore, when the Vice-Chancellor came to the conclusion that the mortgagors had intended that the looms should remain fixed during the continuance of their term, and had so treated them, the case was at an end (c).

Upon the whole, in view of the above cases, it is thought that evidence of the usage of a particular trade cannot be of much utility in considering whether an article is a fixture or a chattel (d), except so far as it may show the use to which the article is applied, and the extent of the physical annexation.

Effect of intention in determining whether an article is a fixture.

This naturally leads to the further inquiry—What effect is to be given to the expressed intention of a person that an article affixed by him to the soil shall remain a chattel, although from the manner in which it is attached, and the use to which it is in fact applied, the law would otherwise determine that it had become a part of the land? In ascertaining the character of a thing annexed to the soil, the Court will have regard to the intention of the person making the annexation, as evidenced by the nature of the thing annexed, the mode of annexation, and the object and purpose with which it is made. But it would seem that the mere intention of the person annexing will not prevail against the evidence thus afforded by his overt acts; and that, if the Court be of opinion that there

(b) See *post*, p. 67.

(c) *Ante*, p. 19.

(d) As to effect of evidence of custom in questions of removability, see *post*, p. 65.

was sufficient annexation, and that it was not for a merely temporary purpose, the fact that the person affixing the article intended it to remain a chattel will be insufficient to cause it to retain that character. There is no direct authority on the point in this country; but the remarks of Lord Cockburn in a case in Scotland (*e*), seem to point to this conclusion, where he says that no man can make his property real or personal by merely thinking it so, and that the fact that persons were in the habit of dealing with real property as if it were personal would not alter its legal character. It must not, however, be understood from this that persons may not agree as between themselves to regard as chattels things which are in reality fixtures; it is only intended to point out that such agreement cannot affect their actual character. In America, there is a decision directly in point (*f*). There, in deciding that a statue erected by a sculptor in the grounds of his house was a fixture, it was held that the declaration of the sculptor that it was for sale, and that he only intended to retain it in its position until sold, could not alter the deduction made by the law from the facts and circumstances of the case (*g*).

In the requisite that to constitute a fixture an article must be so affixed as to be part of the land a principle is involved, which may be considered as the foundation of the law relating to this species of property, and which it may be proper to examine in this preliminary chapter. It is the effect which, in a legal point of view, is produced upon a personal chattel, by the act of annexing it to the freehold. It is a maxim of law of great antiquity, that

Legal effect
of annexation.

(*e*) *Dixon v. Fisher*, 5 D. at pp. 793, 799; *S. C.* on appeal in the House of Lords, 12 Cl. & F. 312.

(*f*) *Snedeker v. Warring*, 2 Kernan (N. Y. Rep.), 170,

cited *ante*, p. 22. Approved in *Wadleigh v. Janvrin*, 41 New Hampshire, 504.

(*g*) See, however, *Tift v. Horton*, 13 Am. Rep. 537.

Part I.

Fixtures
parcel of the
freehold.

whatever is fixed to the realty is thereby made a part of the realty to which it adheres, and partakes of all its incidents and properties. By the mere act of annexation a personal chattel immediately becomes part and parcel of the freehold itself. In this sense the maxim *quicquid plantatur solo, solo cedit* (*h*), is applicable in our law. This proposition the reader will find laid down as a general principle, in almost every one of the cases to which it will be necessary to refer in the course of the present work; and, indeed, many of the decisions proceed exclusively upon it (*i*).

Now the mode in which the law of fixtures operates in every case in which there is a right of severing a thing from the freehold by virtue of it, may be explained in two ways; either on the supposition that the chattel nature of the thing is still preserved after its annexation; or by considering that the thing ceases to be a chattel by being affixed to the land, and becomes real property, but reducible again to a chattel state by separation from the realty. It will be found, upon an inspection of the cases, that the latter is the correct explanation, and that that is so notwithstanding that in favour of creditors a sheriff may seize fixtures under a writ of *fi. fa.*, for until they are

(*h*) In several of the old books "fixatur" is used as synonymous with "plantatur." See *Climie v. Wood*, L. R., 3 Ex. 257, 260.

(*i*) It is recognized in particular in the following authorities, Yr. Bks. 10 Hen. 7, p. 2, pl. 3; 20 Hen. 7, p. 13, pl. 24; 21 Hen. 7, p. 26, pl. 4; Co. Lit. 53 a; *Herlakenden's case*, 4 Co. 64 a; *Culling v. Tufnal*, Bul. N. P. 34; *Lord Dudley v. Lord Warde*, Amb. 113; *Tarrant v. Lawton*, 3

Atk. 13; *Lee v. Risdon*, 7 Taunt. 188, 191; *Minshall v. Lloyd*, 2 M. & W. 450, 459; *Meux v. Jacobs*, L. R., 7 H. L. 481, 490; *Bain v. Brand*, 1 App. Cas. 762, 767, cited *post*, p. 234; *Holland v. Hodgson*, L. R., 7 C. P. 328, 333; *Lee v. Gaskell*, 1 Q. B. D. 700, 702. See, too, *Wake v. Hall*, 8 App. Cas. 195, *post*, p. 31: As to cases in which an article in *alieno solo* does not become a part of the realty, see *post*, p. 36.

severed they are part of the freehold (*k*). The circumstance of the property being subject to a right of removal, and of being re-converted to a personal chattel, does not affect the nature and condition it has acquired by being incorporated with the realty. It ceases to be a chattel as long as it remains affixed to the freehold, and the only exception to the general rule is, not to its being affixed to, or being part of the freehold, but as to the right of removal (*l*).

Chap. I.

Fact of property being removable makes no difference.

It is true that in some of the decisions, an article which is held to be removable is expressly said not to be parcel of the freehold. But these, and other like general expressions, may, consistently with the principles of those decisions, be interpreted to mean, that the property is not considered, *in every respect*, in the same condition and subject to the same rights as other parts of the freehold.

With reference to the statement that whatever is affixed to the realty becomes part thereof, it must be mentioned that a person having only a right to the use of a chattel for a limited time, cannot, by annexing it to the soil, make it a part of the realty. Thus, where a tenant for life was entitled to the use of certain chattels during his estate, it was held that he could not, by attaching them to the free-

Wrongdoer cannot, by annexing chattel, make it part of realty.

(*k*) *Dumergue v. Rumsey*, 2 H. & C. 777, 799; and see *post*, p. 393.

(*l*) See *Att-Gen v. Gibbs*, 3 Y. & J. 333, 343, per Alexander, C. B.; *Minshall v. Lloyd*, 2 M. & W. 450; *Mackintosh v. Trotter*, 3 M. & W. 184; *Ex parte Barclay, In re Gawan*, 5 D. M. & G. 403, 410; *London and Westminster Loan, &c. Co. v. Drake*, 6 C. B., N. S. at pp. 807, 808; *Gibson v. Hammersmith R. Co.*, 32 L. J., Ch. at p. 342; *Dumergue v. Rumsey*, 2 H. &

C. 777, 799, per Williams, J.; *Meux v. Jacobs*, L. R., 7 H. L. 481, 490; *Bain v. Brand*, 1 App. Cas. 762, 767, per Lord Cairns, L. C. And see *Lee v. Gaskell*, 1 Q. B. D. 700, 702; *Finney v. Grice*, 10 Ch. D. 13, per Jessel, M. R. Fixtures have been compared in respect of their freehold character to trees. See *Farrant v. Thompson*, 5 B. & Ald. 826, 828; *Ryall v. Rolle*, 1 Atk. 165, 175. And they have sometimes been called "moveable freeholds."

Part I.

Unless article
becomes in-
tegral portion
of soil.

hold, turn mere loose personal chattels into fixtures inseparably attached to the soil, and thereby affect the rights of his successors (*m*). *A fortiori*, a person in wrongful possession of a chattel cannot alter its character, as against its rightful owner, by annexing it to the soil. Upon this point the American case of *Central Branch Railroad Co. v. Fritz* (*n*) may be referred to. There a frame building belonging to A., set upon blocks of wood, was wrongfully removed and placed upon a permanent foundation upon the land of B. (*o*). It was held that the building being removable from the land of B. without any substantial injury, either to the land or itself, remained a mere chattel belonging to A., and did not become a part of B.'s land. On the other hand, if the article so annexed has lost its individuality, and has become merely an integral portion of something which is itself a part of the soil—as, for instance, bricks composing a wall, or timber in a house—it has ceased to be a chattel even as against its former owner. Thus, in Bacon's Abridgment (*p*) it is laid down that "if a piece of timber, " which was illegally taken from J. S., have been hewed, " this action does not lie against J. S. for retaking it. " But if a piece of timber, which was illegally taken, have " been used in building or repairing, this, although it is " known to be the piece which was taken, cannot be retaken, " the nature of the timber being changed ; for by annexing " it to the freehold it is become real property " (*q*).

(*m*) *D'Eyncourt v. Gregory*,
L. R., 3 Eq. 382, 394.

(*n*) 27 Am. Rep. 175.

(*o*) There does not seem to have been any physical annexation to the foundation, but as in America it seems that a building so constructed is considered to be part of the realty, this fact made no difference in the decision. Compare *Fryatt v. Sullivan*,

&c. Co., 5 Hill (N. Y. Rep.) 116 ; 7 *id.* 529.

(*p*) Tit. Trespass (E. 2), p. 673.

(*q*) See, too, Brooke's Ab. tit. Propertie, pl. 23 ; *id.* tit. Trespass, pl. 275 ; Bracton, Lib. II. cap. 2, § 6 ; Yr. Bk. 5 Hen. 7, p. 15 ; Fitzherbert's Ab. tit. Barre, § 144, p. 43 ; Moore, 19. For the provisions of the Civil Law, see

Chap. I.

Nature of the
right of re-
moval.

With respect to the right mentioned in the second branch of the definition of the term fixtures (*r*)—viz., of severing and removing an article annexed to the land,—it is a circumstance of ordinary occurrence, that persons having the present interest and possession of land, whether as tenants for years, for life, or in fee, make annexations to the freehold, exclusively for their own convenience or profit, either by placing an erection on the soil itself, or by affixing some personal chattel to a house or other building that has been already annexed to the soil. Now, in respect of many of these annexations, if the individuals who put them up, or their personal representatives, were afterwards to detach and remove them from the freehold, they would be subject, according to the general rule of law, to an action of waste or trespass, at the suit of the reversioner, or of the heir succeeding to the estate; for, as we have seen (*s*), whatever is so annexed becomes part of the realty, and in such cases the person who was the owner of it when it was a chattel, loses his property in it, which immediately vests in the owner of the soil (*t*). But there are certain species of annexations as to which modifications have been made in this general rule. With respect to these, the right of property in them is not, as in other cases, absolutely vested in the landowner by their being affixed to the freehold; but they may be again separated from the land, and taken away, against the will of those persons who would have become entitled to them by reason of their ownership in the soil. It is of the right to remove annexations of this description that it is proposed to treat in the present work.

It will be well, in this place, to allude to the very recent case of *Wake v. Hall* in the House of Lords (*u*), in which

Digest, XLI. 1, 7, 10; Inst. Lib. II. 1, 29. And see *Wake v. Hall*, 8 App. Cas. 195.

(*r*) *Ante*, p. 2.

(*s*) *Ante*, p. 28.

(*t*) *Bain v. Brand*, 1 App. Cas. 762, 772, per Lord

Chelmsford. And see *post*, p. 42. For statutory exceptions to this rule, see *post*, pp. 77, 92.

(*u*) 8 App. Cas. 195; *post*, pp. 38, 67.

Part I.

the effect of annexation, as regards the property in the thing annexed, underwent considerable discussion. The conclusion to be drawn from that case seems to be, that while everything which is annexed to land admittedly becomes a part of it, the maxim *quicquid plantatur solo, solo cedit* must not be understood as meaning that in all cases a person annexing a chattel to the soil of another irrevocably loses his property in such chattel. The property vests in the owner of the soil because the chattel has ceased to exist as such, and has become a part of the realty. But that property is, in many cases, not absolute, but subject to be divested by the act of severance by the former owner of the chattel, by virtue of a special property or interest still remaining in him.

Upon what
the right of
removal de-
pends.

In order to explain more fully the nature of the privilege above spoken of, it will be necessary briefly to point out the principal considerations upon which questions respecting the right to remove fixtures have turned; reserving, however, for another place, the more detailed examination of them. These considerations are : The *nature* of the thing affixed, whether it was a chattel, in gross or in part, before it was put up.—The *situation of the party* claiming the right, as the executor of a tenant in fee, of tenant in tail, or tenant for life; or the tenant of a chattel interest, and, with respect to him, the continuance of his right after the expiration of his term, and re-delivery of possession to his landlord.—Again, arguments derived from the *intention of the parties* in making the annexation have been used in several of the judicial decisions.—Others have been drawn from the *comparative value* of the fixture and the land in a state of union, and when disunited.—And so the effect of *custom*, and the *injury occasioned to the freehold* by the removal, have respectively been relied upon. But the great and leading principle which has governed all the decisions relating to the doctrine of fixtures, is the *object and purpose* for which the annexation has been made; that
 whether it was for the purpose of *trade*, for *agri-*

culture, for *ornament* merely, or for the *general improvement* of the estate. It is upon these different grounds, generally, however, upon some combination of them, that the Courts both of law and equity have ascertained and supported the right of property in fixtures.

Now from a review of these several considerations it will be seen, that the right of removing fixtures is of a very different description from that by which the proprietor of land severs and removes property of a personal nature, which has been annexed to his own freehold. In this latter case, the proprietor exercises the same right to all purposes that he enjoys in respect of cutting down trees, or doing any other act as owner of the land; it is a right arising altogether out of ownership of estate. But where an individual, under the privilege conferred by the law of fixtures, separates and removes a personal chattel which has been affixed to the soil by himself or those under whom he claims, the right exercised by him does not arise merely out of an interest in the land, but is a special privilege allowed by the law in certain cases only, and in favour of particular classes of persons; and it is, moreover, a privilege in derogation of the rights of the individual to whom the property would appertain as owner of the estate. It appears, however, from an attention to the principles on which the power of removal in these cases depends, that it is always connected with some interest in the land, and is not simply collateral to it: it is a power coupled with an interest (x).

Distinct from the rights of the owner of the estate.

With a view to explain to the reader more fully the rule of law laid down in the preceding pages, it may not

(x) *Poole's case*, 1 Salk. 368, per Holt, C. J.; *Minshall v. Lloyd*, 2 M. & W. at p. 460, per Alderson, B.; *Saint v. Pilley*, L. R., 10 Ex. at p. 140, per Pollock, B.; *Bain v. Brand*, 1 App. Cas. at p. 768, per Lord Cairns, L. C., *post*, p. 235.

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be uninteresting to notice, in this place, a few cases and authorities which serve to illustrate the principle under consideration in a somewhat striking manner; particularly as it respects the legal effect of the annexation of a personal chattel by a mere stranger to the soil and freehold of another.

Effect of
annexing
alieno solo.

It is observed by Britton (Livre 2, Ch. II. 6), in treating of the right of property by accession, that "property accrues from the fraud and folly of another: as where persons, by malice, or through ignorance, build with their own timber on another's soil, or where they plant or engraft trees, or sow their grain in another's land without the leave of the owner of the soil. In such cases, what is built, planted, and sown, shall belong to the owner of the soil, upon presumption of a gift. For in these cases there is a great presumption that such builders, planters, or sowers intend that what was built, planted and sown, should belong to the owners of the soil, and especially if such structures are fixed with nails, or the plants and seeds have taken root. But if any one perceives his folly, and speedily removes his timber or his trees, before our writ of prohibition comes against his removing them, and before the timber is fastened with nails, or the trees have taken root, he may lawfully do so" (y).

Owner standing by will not be allowed to take advantage.

On the other hand, it is now equally well settled that, if a stranger begins to build on another person's land, supposing it to be his own, and the owner perceives the mistake, and does not interfere, but leaves him to go on, the

(y) To the same effect is the language of Bracton, *De acq. rerum dom.* Lib. II. cap. 2, §§ 4, 6. And his observations are copied with very little alteration by Fleta, Lib. III. c. 2, § 12. The reader

will also find some curious illustrations of the same rule in Perkins, tit. Dower, § 328; Cowell's Inst. bk. 2, tit. 1, § 27; Fulbeck's Par. tit. Devises, p. 39.

owner will not be allowed afterwards to interfere and profit by the mistake without giving compensation (z).

Chap. I.

It appears that, by the custom of London, a man may erect poles on his neighbour's land for repairs without abandoning his property therein (a). Other authorities afford some singular illustrations of the principle under consideration. In Lord Raymond's Reports is the following case, which is thus briefly reported:—*Spark v. Spicer*, Mic. 10 Will. 3, per Holt, C. J. If a man be hung in chains upon my land, after the body is consumed I shall have gibbet and chain. Said upon a motion for a new trial (b). In *Masters v. Pollie* (c), it is said, if A. plants a tree in the land of B., the tree shall belong to B. In *Waterman v. Soper* (d), it was ruled by Holt, C. J., at Lent Assizes at Winchester, upon a trial at *nisi prius* (1697, 1698), that if A. plants a tree upon the extreme limits of his land, and the tree growing extends its root, into the land of B. next adjoining, A. and B. are tenants in common of this tree. But if all the root grows into the land of A., though the boughs overshadow the land of B., yet the branches follow the root, and the property of the whole is in A. (e).

Poles on neighbour's land.

A gibbet erected in *privato solo*.

Trees planted in *alieno solo*, or roots extending into.

(z) *Ramsden v. Dyson*, L.R., 1 H. L. 129. See, also, *Bankart v. Tennant*, L. R., 10 Eq. 141; *Willmott v. Barber*, 15 Ch. D. 96. That corporations are subject to the same rule, see *Crook v. Corporation of Seaford*, L. R., 6 Ch. 551; *Crampton v. Varna R. Co.*, L. R., 7 Ch. 562.

(a) Priv. Lond. p. 59; Com. Dig. tit. London (N. 5).

(b) 1 Ld. Raym. 738. This case is thus reported in 2 Salk. 648. One was ordered by the judge of assize to be hanged in chains. The officer

hung him in *privato solo*. The owner brought trespass, and upon not guilty, the jury found for the defendant; and the Court would not grant a new trial, it being done for convenience of place, and not to affront the owner.

(c) 2 Rolle, 141. And see Moore, p. 19; *Holder v. Coates*, M. & M. 112.

(d) 1 Ld. Raym. 737.

(e) As to this, however, see *Masters v. Pollie*, 2 Rolle, 141. As to the case of trees blown down, or boughs that in lopping fall on to the soil of ano-

Part I.

Stones, &c.,
falling into
soil.

In *Dearden v. Evans* (*f*), it appeared that certain large masses of stone had from time to time fallen from the cliffs above upon the field of a copyholder, and had thereby become imbedded in the soil. There was no evidence to show when any particular portion of them had fallen within living memory. It was held that these stones must be considered a part of the soil below belonging to the lord, and therefore his property, although the cliffs above did not belong to him; and that the copyholder was not entitled to take them for his own profit.

Materials of
uncompleted
erection.

In *Smith v. Render* (*g*), the point was raised whether any portion of the building materials, inserted in the course of erecting a shed, were to be considered as annexed to the land till the shed itself was completed. The Court gave no judgment on this point; but there seems no reason to doubt that if the erection itself, when completed, would be a fixture, each portion of it as it is fixed in position at once becomes a part of the soil.

Mill-fender
in *alieno solo*.

In the case of a chattel placed on the soil of another, but severable from it, it has been held that this does not necessarily become part of the freehold, even though it may be accessory to a principal thing that is itself connected with the soil; but that it is always matter of evidence whether it belongs to the freehold or not. Thus, the owner of a mill had placed a fender for the use of his mill upon a stream of water, where neither the banks of

ther, or fruit that drops from a tree growing in a hedge into the field of another, and that in such cases the property is not lost, see Vin. Ab. tit. Trespass (H. a. 2) and (L. a.); Com. Dig. tit. Pleader (3 M. 39); Bac. Ab. tit. Trespass (F.), p. 674, and (G.), p. 689; *Anthony v. Haney*, 8 Bing.

186, 192.

(*f*) 5 M. & W. 11. See, also, *Blewitt v. Tregonning*, 3 Ad. & E. 554, that sand drifted and blown from the sea-shore upon a man's close, becomes part of it, and belongs to the owner of the close.

(*g*) 27 L. J., Ex. 83.

the stream nor the adjoining land belonged to him. The fender moved up and down in a groove fixed to the brickwork, and, when down, rested upon a sill also fixed to the brickwork. It was held that this fender did not necessarily become part of the freehold; but that it was matter of evidence whether by agreement it did not remain the property of the original owner, though placed on the soil of another (*h*). It was said by Lord Denman, C. J., in giving judgment (*i*):—"In a case of this kind, it is always open to inquiry, how the article came to be in the place in which it is found, and what the parties intended as to its use; . . . the manner of its becoming connected with the soil may be merely accidental. If a heavy stone bason is placed on a man's land, it is not a fixture. If it sinks into the soil and in that manner becomes fixed, is it therefore a fixture? The rights in such a case must always be subject to explanation by evidence."

Again, in *Lancaster v. Eve* (*k*), the action was for injury to a pile driven about eight feet into the bed of a navigable river, the soil of which was vested in the Crown. The pile was used by the plaintiffs, the occupiers of a wharf, for the purpose of mooring their barges. There was evidence that the pile was placed in the soil of the river for the convenience of the plaintiffs' trade as wharfingers, and not with an intention that it should become permanently attached to the freehold. It was held, that from its long user by them without any interference on the part of the Crown, it might reasonably be inferred that the pile was originally placed there as an easement, and that the plaintiffs were entitled to keep it there, and use and enjoy it as their own property. It will be noticed that in this case

Pile in bed of river.

(*h*) *Wood v. Hewett*, 8 Q. B. 913, explaining *Mant v. Collins*, Q. B., Trin. Term, 1842, not reported.

(*i*) *S. C.* p. 919. And see *ante*, p. 4, note (*l*).

(*k*) 28 L. J., C. P. 235. See *Parsons v. Hind*, 14 W. R. at p. 861, per Blackburn, J.

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the pile was firmly fixed, and therefore the decision goes further than that in *Wood v. Hewett*. But it does not appear that either case is an authority for holding that the *prima facie* inference arising from annexation that an article has become part of the freehold, can be rebutted when it is so annexed as not to be severable without injury to the soil (*l*).

Signboard on
neighbouring
house.

In a recent case (*m*), it has been held, in accordance with the two last-mentioned cases, that an occupier of a public-house might by user acquire a right to have a signboard fixed to the wall of a neighbouring house. The Court came to the conclusion that the signboard was placed by the plaintiff's predecessors in title on the defendant's house, not with the view of allowing it to become part of the property of the defendant's predecessors in title, but by virtue of some easement granted by them to the predecessors in title of the plaintiff.

Custom to
erect and re-
move build-
ings in *alieno*
solo.

Upon a similar principle, a particular custom may give to a person a right to place erections upon the land of another, and afterwards to remove them at pleasure, notwithstanding that whilst annexed to the soil they formed part of it. Thus, by the customs of the High Peak of Derbyshire (revised and amended by 14 & 15 Vict. c. xciv), any person may, upon certain conditions, erect machinery and buildings, for mining purposes, upon the freehold of another. And the right to do so being independent of, and not derived from, the surface owner, the miner may

(*l*) *Lancaster v. Eve*, 28 L. J., C. P. at p. 236, per Cockburn, C.J. As to whether an article in *alieno solo* which has become a part of the freehold may still remain the property of the person annexing it, see per Patteson, J., in *Wood v. Hewett*, as reported 15 L. J., Q. B. at p. 248, and

ante, p. 32.

(*m*) *Moody v. Steggles*, 12 Ch. D. 261. See, too, *Hoare v. Metrop. Board of Works*, L. R., 9 Q. B. 296; *Francis v. Hayward*, 20 Ch. D. 773; affirmed 22 Ch. D. 177. And see *Lane v. Dixon*, 3 C. B. 776; Gilb. Evid., 209 *et seq.*; Swinb. on Wills, pt. 7, § 20.

subsequently during his interest, or even, it seems, within a reasonable time after its cessation, pull down and remove such erections (n).

Adverting now to the more immediate subject of this chapter, in which has been described the general nature of the species of property to which it is proposed to apply the denomination of *fixtures*, it is intended in the ensuing chapters to consider by what persons, and under what circumstances, the right of removal, as above explained, may be exercised and enforced (o).

(n) *Wake v. Hall*, 8 App. Cas. 195.

(o) With respect to the particular points referred to in the last preceding pages, it may be observed that the rules of the civil law in these and the like questions appear to correspond with our own. The maxims of civil law applicable to such cases, are, "*Solo cedit quod solo inædificatur.*" "*Solo cedit quod solo implantatur.*" The extent and application of these principles in the civil law may be found fully explained in the following authorities: — Halifax, Anal. bk. 2, c. 2, § 15; Brown's Comp. bk. 2, ch. 7, § 2, tit. Adjunction; Wood's Inst. bk. 2, ch. 3, § 5, tit. Accession by Building; § 6, tit. By Planting; Bowyer's Commentary, ch. xv. For the rules in regard to such an-

nexations according to the law of Scotland (the general law of fixtures seems to be the same as in England, see per Lord Brougham, *Fisher v. Dixon*, 12 Cl. & F. at p. 326, and per Lord Chelmsford in *Bain v. Brand*, 1 App. Cas. at p. 772), see Stair's Inst. bk. 2, tit. 1, § 40; Hunter's Landlord and Tenant, vol. i. p. 299 (3rd ed.); Rankine's Land Ownership, p. 97. And for those of the Dutch Jurisprudence (in which the Roman Law is much cultivated and its decisions pretty generally followed), see the translation of Grotius, by Herbert bk. 2, ch. x. tit. By Accession. In the French code, the law, as applied to the particular cases under consideration, appears to be very well defined. See Code Napoléon, arts. 517-577.

CHAPTER II.

OF FIXTURES, AND THE RIGHT TO REMOVE THEM, AS
BETWEEN LANDLORD AND TENANT.

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SECTION I.

Of the Right of a Tenant to remove Trade Fixtures.

Part I. It was observed in the preceding chapter that there existed in certain cases, and in favour of particular individuals, a right of severing and removing personal chattels which have been affixed to the freehold (a). And this right, it was said, prevailed over the claims of other persons, who, by reason of their interest in the land, would have had a property in the articles, and might have prohibited their removal, if they were to be considered in all respects like other parts of the freehold. In nearly all the cases relating to the doctrine of fixtures, the conflicting rights of individuals to some particular object have been the subject of dispute, where the one party has claimed the property as being permanently affixed to the freehold of which he is the proprietor, and the other has rested his title to it, on

(a) *Ante*, pp. 31 *et seq.*

the ground of its having been annexed by himself, or by Chap. II. s. 1.
some other person of whom he is the legal representative.

Questions respecting this right to sever fixtures have Parties claim-
ing fixtures.
arisen principally between three classes of persons. First, between landlord and tenant. Secondly, between the executors of tenant for life, or tenant in tail, and the remainder-man or reversioner. Thirdly, between the personal representative and the heir of the deceased owner of the inheritance (b). It is proposed to investigate the law relating to fixtures, by considering the respective claims of these three classes of individuals. And it is thought expedient to examine these claims separately, and according to the order here mentioned; because many of the rules on which the doctrine of fixtures depends will be found not to be alike applicable to each of the classes of persons; to consider them, therefore, under one general head would lead to a confused and inaccurate view of the subject.

The present chapter, then, will treat of the doctrine of Law of fix-
tures between
landlord and
tenant.
fixtures in the case of landlord and tenant; that is to say, of the interest which a tenant continues to possess, and the right of removal that belongs to him, when he has, during his term, annexed to the soil any matter which may be considered a fixture, according to the definition given in the preceding chapter (c).

Now it is obvious that the respective claims of the landlord and the tenant may be affected by the nature and the terms of the contract that has been entered into between them. In order, however, to obtain a correct view of the general principles on which the law of fixtures depends, it is necessary, in the first place, to consider the rights of these parties independently of any private agreement

(b) *Elwes v. Maw*, 3 East, 1 H. Bl. 260, *in notis.*
at p. 51; *Lawton v. Salmon*, (c) *Ante*, p. 2.

Part I.

between them. The situation of the tenant, and the extent of his privileges, may or may not be varied by the conditions he makes with his landlord; and the consideration of this part of the subject will be fully entered upon hereafter (*d*). For the present, therefore, it must be supposed that nothing is found in the terms of the demise controlling the general right of the tenant in regard to fixtures, and that there exists between the parties nothing but the mere relation of landlord and tenant.

General rule as to annexations by a tenant.

The general rule of law, with respect to annexations made by a tenant during the continuance of his term has been established from a very remote period, and may still be regarded as the rule in ordinary cases. It is, that whenever a tenant has affixed any thing to the demised premises during his term, he can never again sever it without the consent of his landlord. The property, by being annexed to the land, immediately belongs to the freeholder: the tenant, by making it a part of the freehold, is considered to abandon all future right to it, so that it would be waste in him to remove it afterwards. It therefore falls in with his term, and comes to the reversioner as part of the land (*e*).

Rule relaxed in modern times.

A strict observance of this rule, which appears originally to have admitted of no distinction, whatever may have been the object of the annexation, or the intention of the party in making it, must have been attended with great hardship and injustice to tenants; and it may be supposed that early endeavours were made to obtain a relaxation of it. In progress of time certain exceptions and modifications were introduced into the rule, which tended greatly to

(*d*) *Post*, p. 145.

(*e*) Co. Lit. 53 a; *Herlakenden's case*, 4 Co. 64 a; *Cooke's case*, Moore, 177; per Lord Ellenborough, C. J., in

Elwes v. Maw, 3 East, at p. 51; per Kindersley, V.-C., in *Gibson v. Hammersmith Rail. Co.*, 32 L. J., Ch. at p. 340. See *ante*, p. 31.

limit its operation, and led to the establishing of some very important privileges in favour of tenants, which have since been confirmed to them by a succession of judicial decisions. It appears, however, from the old reports, that the indulgence was at first granted by the Courts not without doubt, and after some struggle. Indeed, on its introduction, it does not seem to have been maintained upon any settled or intelligible ground; for, in the earlier cases, the privilege is found to be built on legal subtleties and nice distinctions, instead of being made to rest upon principles of general policy, which the modern determinations have declared to be the proper foundation of it. Chap. II. s. 1.

At this distance of time it is difficult to ascertain the precise period when a relaxation of any kind was first admitted. It was said by Lord Holt (*f*), in allusion to a particular class of fixtures, that the right of the tenant to remove erections of that description was by the common law. Perhaps this expression is not to be understood literally; for it should be recollected that at common law, and before the statute of Gloucester, a tenant for years was not punishable for any species of waste (*g*). It was only after that statute, and in consequence of its provisions, that questions respecting the right of removing things erected by tenants during their term frequently became the subject of judicial consideration; and many of these questions are to be met with in the reports of very early cases. The fixtures to which Lord Holt refers are those which a tenant erects upon the demised premises for the purpose of carrying on his trade and manufacture. The

Tenant not punishable for waste before Stat. of Gloucester.

(*f*) *Poole's case*, 1 Salk. 368.

(*g*) See *post*, p. 352. Prior to this statute the owner of the freehold seems to have had no remedy where the tenant severed annexations to the soil. "He cannot com-

" mit waste, and that is the
 " only reason that I am aware
 " of why he cannot pull them
 " down and remove them
 " during his term." *Wake v. Hall*, 7 Q. B. D. 295, 301, per Lord Selborne, C.

Part I.

law respecting this class of annexations forms a very important branch of the present inquiry; and as the tenant's right in these cases is undoubtedly more extensive, and rests upon more settled principles, than any other he enjoys in respect of fixtures, and is also represented to have been established first in order of time, it may be proper to begin by investigating the claims of the tenant, in removing fixtures of this description.

Of trade
fixtures.

First, then, of fixtures erected by a tenant for purposes of *trade and manufacture*.

The facts of several of the cases to which it will be necessary to refer will of themselves suggest, that the trade carried on by a tenant may be of two kinds. It may be a trade unconnected with and independent of the land he occupies, such as dyeing, brewing, &c.; or it may be a trade derived from the land, and depending essentially on its peculiar produce; as the getting and vending of coals from a colliery, or the manufacturing of salt from salt springs. The distinctions which may thus be observed in the nature of the tenant's business and employment will hereafter become the subject of particular notice (*h*); inasmuch as they are the foundation of certain rules in the doctrine of fixtures which are very important and involve points of difficult solution. At present, however, it will be more convenient to consider the subject without reference to these distinctions; and merely to suppose that the tenant carries on any general trade upon the premises, and that in the prosecution of his trade, he annexes an article to the freehold, the right of severing and removing which becomes a matter of dispute between himself and his landlord.

Early authorities
examined.

The earliest authority on this subject to which it will be necessary to advert, occurs in the Year Book 42 Edw. 3,

(*h*) *Post*, p. 97.

p. 6. It was an action of waste brought against a lessee, for removing a furnace which he had erected and affixed to the walls of a house demised to him for a term of years (i). The point was then raised, whether the removal of the furnace was justifiable, or if it amounted to waste; and this question was, after discussion, adjourned as doubtful, and was left undetermined.

Chap. II. s. 1.

The next in order is a case in the Year Book 20 Hen. 7, p. 13; in which the question was, whether a furnace fixed to the freehold with mortar should go to the executor, or to the heir of the owner of the fee who had put it up. In the course of the judgment in this case, the Court (Rede, C. J., Fisher, and Kingsmill, JJ.) laid down the following proposition:—"If a lessee for years set up such a furnace for his advantage, or a dyer make his vats and vessels to occupy his occupation during the term, he may remove them."—"And so of a baker. And it is no waste to remove such things within the term, by Some." The report then states, that in 42 Edw. 3, it was doubted whether this was waste or not.

This case is generally adduced as the first which in terms recognises the right of a tenant to remove fixtures. It is quoted, moreover, as the great authority for the prevalence of a rule, in very early times, in favour of trade fixtures. For it is insisted, that the privilege which is there said to belong to the lessee, is admitted in respect of articles of *trade* only; and is to be understood as a right arising solely out of the principle of protecting commerce and manufactures. The expression in the original, which has given rise to the supposition, is "*pour occupier son occupation*;" and it has been imagined, that the instances

Whether relaxation first introduced in respect of *trade* only.

(i) The fact of the furnace being annexed to the *wall* is not mentioned in the report; but it appears to have been so fixed according to the remarks on the case in subsequent authorities in the Year Books. See 21 Hen. 7, p. 26.

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of the dyer's vessels are intended, not merely to signify additions made by a tenant for his common domestic accommodation, but to indicate fixtures put up by him expressly in relation to the trade which he is carrying on upon the premises.

It may, however, be doubted if this is a fair inference from the case cited. For, in the first place, it deserves to be mentioned, that in another report (*j*), or rather abstract of the case in the Year Book 20 Hen. 7, which was published at a subsequent but very early period, the passage upon which the supposition in question mainly proceeds is particularly introduced, but the expression "*pour occupier son occupation*" is left out. If this circumstance had been suggested to the Courts in the discussion of the subsequent cases, it would probably have been thought to merit attention, as tending to show that the rule laid down by the judges in the time of Henry the Seventh was not universally considered to have been founded on an exception arising solely out of trade (*k*).

(*j*) It is a book printed A.D. 1614, entitled "Unabridged ment de tous les Ans del Roy Henrie le Sept," and the position in question is thus expressed: "And if lessee for years makes any such furnace for his pleasure, or a dyer makes his vats and vessels, he may remove them during the term," &c. "and so of a baker. And some *semb.* that it is not waste to remove such things within the term; but this is contrary to the opinions aforesaid," &c.

(*k*) It may not be unimportant to notice the manner in which the concluding part of the above passage from the

Year-Book, on which so much stress has been laid, has been construed. In *Elwes v. Maw* (3 East, at p. 42), the counsel read it thus: "It is no waste to remove such things within the term by *any*:" Lord Ellenborough renders it, "It is not waste to remove such things within the term by *some*:" according to either of which constructions, it seems to be left in doubt whether the concluding words of the sentence are not intended to refer to *tenants*. In the original, the sentence is thus printed and punctuated. "Et n'est ascun waste de remuer tiel chose deins le terme, per Ascuns;" it is

And the inference that trading fixtures were not particularly and exclusively intended by the judges in this case will more clearly appear from the remark which follows in the report; viz., that in 42 Edw. 3, it was doubted whether this was waste or not. Now, on referring to the case in 42 Edw. 3, p. 6, it will appear that no allusion whatever is made to an exception in favour of trade, neither is it mentioned or implied that the furnace there in dispute was erected for a trading purpose. Again, in the same sentence in which the dyer's vat is mentioned, and immediately before it, is put the instance of a furnace erected by a lessee, and this is said to be removable like the vat. And so far from its being intimated that the furnace is connected with trade, it is, on the contrary, described as put up for the convenience of the lessee, "*pour son avantage*," or (as the Abridgement has it), "*pour son pleasure*" (l).

But further, if this principle of allowing an exemption on the ground of trade had been clearly recognized in the case in question, it might be expected that it would have been applied to the solution of subsequent cases. But the contrary is the fact; and all the ancient cases which follow the decision of 20 Hen. 7, are found to proceed upon a distinction depending altogether upon the mode of annexation. Thus, in a case which occurred immediately afterwards, and before the same judges (m), it was laid down by the Court, that if a lessee makes an erection, as a furnace or post, &c. and fixes it to the soil, or to the middle of the house only, and not to the walls, he may take it away. Nothing is said in this case of a distinction in

Mode of annexation ground of decision in old authorities.

no waste to remove such things within the term, according to the opinions of some JUDGES. It is clearly thus intended, from what immediately follows in the report. See also the corresponding expressions

in the extract in the preceding note.

(l) And see 8 Hen. 7, p. 12.

(m) Yr. Bk. 21 Hen. 7, p. 26. And see Br. Ab. tit. Chattels, pl. 7, 11.

Part I.

respect of trade: on the contrary, Kingsmill, J., apparently in allusion to the particular instances of vats in a brew-house, or dye-house, relies solely on their construction and annexation; and says the removal of such things would not be waste, *because* the house would not be impaired by it. So, lastly, in the cases which followed some time after those in the Year Books, there is no recognition whatever of any peculiar privilege in regard to trade. For *Cooke's case* (n) (temp. 24 Eliz.) is wholly silent upon it. And in *Day v. Austin & Bisbitch* (temp. 37 Eliz.) (o) (which respected the power of a sheriff to seize a furnace under an execution against a termor), the article is expressly stated to have been erected for the use of a dyer; and the Court adverting to the right of the termor himself in such a case, determine it by the circumstance of the article being fixed to the walls, and not to the middle of the house. On this particular ground they consider that the furnace would not be removable; and the principle of an exemption on the ground of trade is altogether unnoticed (p).

Upon the whole, then, it can scarcely be inferred, that the expressions used by the Court in 20 Hen. 7, p. 13, were employed in any other sense than as mere general examples of fixtures, the object of which was to illustrate the legal doctrine of an exception introduced for the benefit of all tenants alike, by a less rigid construction of the old rule of law. Indeed with regard to the dictum itself, it should be observed, that it is entirely extra-judicial, and appears in a decision in which the judgment of the Court proceeded on a totally different principle, the question being one between heir and executor (q).

(n) Moore, 177.

(o) Owen, 70; *S. C. Cro. Eliz.* 374. And see 1 Roll. Ab. 891 (Y).

(p) In the report of this case, as cited in Wentworth's Office of Executors, p. 150

(14th ed.), it is said, that the jury found that by the *custom* of Kent the lessee might remove such articles.

(q) See remarks on this question in the notes to *Elwes v. Maw*, in Smith's Leading

The examination of the early authorities which has thus been made, may not be deemed useless in this place, because it may serve to give the reader a more perfect view of the doctrine relating to fixtures, by presenting a comparison between the law as it stood formerly, and as he will find it established in later times. The observations that have been made are intended chiefly to show, that it is by no means clear that an exception of any kind in favour of tenants was admitted in very early times; and moreover, that when the exception was introduced, it seems to have extended as fully to other fixtures, as to those which related immediately to trade. And yet it is a notion which appears to have prevailed very generally, that the first modification of the ancient rule was exclusively in favour of commerce, and that this is plainly, and without dispute, pointed out in the old cases.

Chap. II. s. 1.

Result of the early authorities.

However, the equivocal state of the law in its earlier stages is of little importance at the present day. For the privilege of a tenant to remove fixtures set up by him in relation to his trade was plainly and authoritatively stated by Lord Holt, C. J., in *Poole's case* (r); and it has since been recognised in a series of uniform decisions of modern date. *Poole's case* occurred a considerable length of time after the decisions cited in the preceding pages. It was the case of a soap-boiler, an under-tenant, who, for the convenience of his trade, had put up certain vats, coppers, tables, and partitions, and had paved the back-side, &c., all which things had been taken under an execution against him; on which account the first lessee brought an action against the Sheriff for the damage occasioned to the house, which he was liable to make good. Lord Holt held that

Modern decisions in favour of trade.

Poole's case.

Cases, vol. ii. p. 193 (8th ed.), where, however, it appears to be thought that the argument in the text rests wholly on the Abridgement referred to. See,

also, *Gibson v. Hammersmith Rail. Co.*, 32 L. J., Ch. at p. 341, per Kindersley, V.-C. (r) 1 Salk. 368 (temp. 2 Ann.)

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during the term the soap-boiler might well remove the vats he set up in relation to trade; and he said moreover that he might do it by the common law (and not by virtue of any special custom), in favour of trade, and to encourage industry (s).

The principle of the relaxation.

The right of a tenant to take away trade fixtures may be considered to have been established from this time. And not only has it been confirmed by many subsequent decisions, but a very sound and satisfactory principle is assigned as the foundation of the privilege. This is to be collected in the first instance from some cases which came before the courts of equity, during the period in which Lord Hardwicke presided there. It becomes, therefore, necessary to refer to these decisions. And as it will be found that the particular claims to which they relate were not, in fact, between landlord and tenant, but between other parties, viz. the executors of tenant for life and the remainderman, it is proper briefly to premise, that the privilege of removing fixtures (as will be more particularly shown hereafter), is considered to be construed more liberally in the case of a common tenant against his landlord, than in the case of a tenant for life, or in tail, against the remainder-man, or reversioner, or in that of an executor of tenant in fee against the heir. And hence it may be received as a rule, that the decisions in favour of the executors of tenants for life, in tail, or in fee, as against the remainder-man, reversioner, or heir, may in general be applied to cases between landlord and tenant, and are to be considered as governing authorities in support of a *tenant's* rights (t).

(s) As to this, see *ante*, p. 43.

(t) See *Lawton v. Lawton*, 3 Atk. at p. 15; *Lord Dudley v. Lord Warde*, Amb. at p. 114; *Penton v. Robart*, 2 East, at p. 7. *Maw*, 3 East,

at p. 51; *Whitehead v. Bennett*, 27 L. J., Ch. at p. 475; *Bain v. Brand*, 1 App. Cas. at p. 777; *Syme v. Harvey*, 24 D. at pp. 210, 213. And see the remarks *post*, p. 175.

Of these cases in equity, the most important is that of *Lawton v. Lawton* (u), which was decided in the year 1743. Chap. II. s. 1.
Lawton v. Lawton.
The question in this case was, whether a fire-engine (or steam-engine) set up for the benefit of a colliery by a tenant for life, should at his death go to his executors as part of his personal estate, or to the tenant in remainder. Lord Hardwicke, in his judgment, thus explains the principle of the rule respecting trade erections:—"To be
" sure in the old cases they go a great way upon the an-
" nexation to the freehold, and so long ago as Henry the
" Seventh's time, the courts of law construed even a copper
" and furnaces to be part of the freehold. Since that time,
" the general ground the Courts have gone upon of re-
" laxing this strict construction of law is, that it is for the
" benefit of the public to encourage tenants for life to do
" what is advantageous to the estate during their term."

In the case of *Lord Dudley v. Lord Warde* (v), which *Lord Dudley v. Lord Warde.*
followed shortly after that of *Lawton v. Lawton*, there was a similar question as to the right of the executor of a particular tenant to take a fire-engine as against the remainder-man. On this occasion Lord Hardwicke observed, "Some general rules are very clear, as what is
" annexed to the freehold is to be considered as part of it;
" and yet there are some exceptions to that rule, as be-
" tween landlord and tenant; what is erected by the
" latter for the sake of *trade* may be removed, though
" fixed to the freehold."—"The determinations have been
" from consideration of the benefit of trade."

The decisions in the courts of common law will be found to have proceeded upon the same principle. In *Lawton v. Salmon* (w) in the King's Bench, before Lord Mansfield, *Lawton v. Salmon.*

(u) 3 Atk. 13. (w) 1 H. Bl. 260, *in notis*;
(v) Amb. 113; Bul. N. P. S. C. *sub nom. Lawton v. Lawton*, 3 Atk. 16, *in notis*;
34. Amb. 114, *in notis*.

Part I.

C. J., there was a question between the executor and the heir of a person who, some years before his death, had placed certain vessels called salt pans, fixed to the ground, in buildings erected upon his salt works; and, after consideration, the opinion of the Court was given in favour of the heir, on the particular grounds explained in another chapter of the work (x). But in the course of the judgment, Lord Mansfield states that there had been a relaxation of the strict rule, for the benefit of trade, between landlord and tenant; that many things might be taken away which could not formerly, such as erections for carrying on any trade, when put up by the tenant. "It
 " would have been a different question if the springs had
 " been let, and the tenant had been at the expense of
 " erecting these salt works: he might very well have
 " said, 'I leave the estate no worse than I found it.'
 " That, as I stated before, would be for the encourage-
 " ment and convenience of trade, and the benefit of the
 " estate" (y).

So in a subsequent case it was said by Lord Kenyon (z), that "the old cases upon this subject leant to consider as
 " realty whatever was annexed to the freehold by the
 " occupier; but in modern times the leaning has always
 " been the other way in favour of the tenant, in support
 " of the interests of trade which is become the pillar of
 " the state."

Remarks of
 Lord Ellen-
 borough in
Elwes v. Maw.

It is unnecessary to enter into a detail of other cases, in which the principle under consideration has been repeated and enforced (a). It will, however, be proper to advert to

(x) *Post*, p. 222.
 (y) See per Tindal, C. J.,
 in *Earl of Mansfield v. Black-*
burne, 6 Bing. N. C. at p. 438.
 (z) *Penton v. Robart*, 2 East,
 at p.
 (

authorities

upon the subject, see Com.
 Dig. tit. Waste (D. 2); Vin.
 Ab. tit. Landlord and Tenant;
id. tit. Waste (F.); Bac. Ab.
 tit. Waste (C.) 6; Bul. N. P.
 34; *Greene v. Cole*, 2 Wms.
 Saund. at p. 259; *Bain v.*

the remarks of Lord Ellenborough upon this subject, because the reasons which he appears to assign for the rule in respect of trade fixtures may be thought, in some measure, to differ from those which have been already examined. In the case of *Elwes v. Maw* (b) (a leading decision upon the doctrine of fixtures), Lord Ellenborough, in stating the several exceptions which, as between different parties, had been engrafted upon the old rule of law, in favour of trade and of vessels and utensils which are subservient to trade, observes, that this exception is founded on the principle of trade being a matter of a *personal nature*; whence it follows, that an article which is used as an accessory to trade ought itself to be deemed personalty, and not a part of the freehold. This explanation of the rule does not appear to have been adopted by any other authority (c): and it is observable, that, in deciding the case of *Elwes v. Maw*, Lord Ellenborough relies less upon this technical view of the nature of trade, than upon the course of precedents. Indeed, as the principle must have been coeval with the common law, instead of originating in modern times, it would have authorised the removal of trade fixtures long before the privilege was, in fact, generally admitted by the Courts.

Chap. II. s. 1.

The inference, then, to be drawn from the several cases which have been cited is, that a tenant has an indisputable right to remove fixtures which he has annexed to the demised premises for the purpose of carrying on his trade; and that the benefit of the public may be regarded as the

Public benefit the ground of the relaxation.

Brand, 1 App. Cas. at p. 767. Of the several cases cited in the text, it should be observed that a fuller statement of the facts and of the grounds of their determination will be found in subsequent pages. They are introduced here not so much for the sake of the

decisions, as to shew the principle on which the exceptions for the benefit of trade are founded.

(b) 3 East, 38, 53; 2 Sm. L. C. 169, 184 (8th ed.).

(c) It is, however, referred to by Lord Blackburn in *Wake v. Hall*, 8 App. Cas. at p. 204.

mere utensil or instrument of trade, or machinery employed Chap. II. s. 1.
 in trade; or else what might be deemed accessory to such
 articles, in supporting or protecting them, or as being
 instrumental to their convenient use. In almost all of
 them, too, the articles, or the parts of which they were
 composed, were such as, after removal, were capable of
 being again employed for the same or similar purposes.
 Of this description were the furnaces, vats, coppers, &c.,
 in the early cases; the steam-engines in the cases before
 Lord Hardwicke (*e*); and the salt-pans before Lord Mans-
 field (*f*). These instances, therefore, cannot be considered
 as carrying the tenant's right of removal to any great
 extent. But, in the *dicta* and observations that are to be
 met with in some of the decisions, the exception in favour
 of trade is found to be laid down in very comprehensive
 and general terms. For not only have utensils and instru-
 ments of trade been specified, but buildings and erections
 have been mentioned without any qualification as to their
 nature or construction (*g*). It now, therefore, becomes
 necessary to give a more particular description of the
 articles mentioned in the cases that have been referred
 to; which was omitted in the former pages, in order that
 the subject then under inquiry might not be embarrassed
 by detail. Other decisions which have reference to the
 extent of the tenant's right of removal, will afterwards be
 stated and explained.

In the case of *Lawton v. Lawton*, before Lord Hard-
 wicke (*h*), it was determined that a fire-engine or steam-
 engine erected by a tenant for life should at his death go

Steam-
engines and
machinery.

(*e*) *Lawton v. Lawton*, 3
 Atk. 13; *Lord Dudley v. Lord*
Warde, Amb. 113.

(*f*) *Lawton v. Salmon*, 1 H.
 Bl. 260, *in notis*.

(*g*) Per Lord Kenyon in
Dean v. Allalley, 3 Esp. 11,

and in *Penton v. Robart*, 4
 Esp. 33; per Lord Mansfield
 in *Lawton v. Salmon*, 1 H. Bl.
 260; per Lord Ellenborough
 in *Elwes v. Maw*, 3 East, 38.

(*h*) *Supra*.

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to his executor as part of his personal assets. The fire-engine was described as a piece of machinery with a shed over it, in which holes were left for the timbers, to make it more commodious for removal. It was stated in evidence, that such articles were very capable of being carried from place to place; but it was shown, on the other side, that they could not be removed without tearing up the soil and destroying the brickwork. The case of *Lord Dudley v. Lord Warde*, also before Lord Hardwicke (i), was, in all its circumstances, very similar to that of *Lawton v. Lawton*.

These two decisions, although between other parties, may be regarded, according to the rule laid down in a preceding page (j), as direct authorities upon the subject of the tenant's rights. Indeed, it was said by Lord Hardwicke in the former case that the right of removing steam-engines would be very clear as between landlord and tenant: and in *Climie v. Wood* (k), it was said of an engine and boiler, the former of which was screwed down to thick planks lying on the ground and the latter fixed in brickwork, that it was clear that as against a landlord these articles would have been removable by a tenant. These cases establish, therefore, that a tenant is entitled to take away engines and other machines like the steam-engines, put up by him at his own expense for trading or manufacturing purposes (l). In determining these cases, however, it is evident that the construction and mode of annexation of the articles are material circumstances; for Lord Hardwicke begins his judgment in *Lawton v. Lawton* by remarking, that it appeared from the evidence, that the engine in dispute was in its nature a personal moveable chattel, taken either in gross or in part, before it was put up.

(i) Amb. 113.

(j) *Ante*, p. 50.

(k) L. R., 3 Ex. 257; 260, 4 Ex. 328, 330. And see *Whitehead v. Bennett*, 27 L. J., Ch. at p. 475, per Kindersley, V.-C.

(l) As to removability of pumps, see *Grymes v. Boweren*, 6 Bing. 437, *post*, p. 114. Compare *Chidley v. West Ham*, 32 L. T. 486.

Speaking in that case of the right to remove fire-engines, Lord Hardwicke observes further, that “coppers and all sorts of brewing vessels cannot possibly be used without being as much fixed as fire-engines; and in brew-houses especially, pipes must be laid through the walls, and supported by the walls; and yet, notwithstanding this, as they are laid for the convenience of trade, landlords will not be allowed to retain them” (*m*). Chap. II. s. 1.
Vessels and pipes in brew-houses.

In the discussion of the above case of *Laulton v. Lawton*, a decision of Comyns, C. B., respecting a cider mill was cited by the counsel, and was adopted by Lord Hardwicke. It was stated that the Lord Chief Baron had ruled at Nisi Prius, that a cider mill, let into the ground, belonged to the executor of the deceased owner of the land, as part of the personal estate, and that the heir should not take it as parcel of his inheritance. The principle of this decision is generally represented to have been, that as the mill was employed in the making of cider, the case was brought within the exception in respect of trading erections. And the inference from the determination is, that an article of this description would, in like manner, be removable between landlord and tenant (*n*). Cider mills.

Moreover it appears, upon the authority of Lord Mansfield, that a tenant may lawfully remove pans fixed in salt works. The salt pans in the case of *Laulton v. Salmon* (*o*), Salt pans.

(*m*) For an instance in which utensils, in a distillery, connected together by pipes, were held to be mere chattels, see *Chidley v. West Ham*, *supra*.

(*n*) The case is not found in any of the reports. It has been recognised as law by several eminent judges; but its authority has been impugned in the House of Lords in *Fisher v. Dixon*, 12 Cl. & F.

312 (see *post*, p. 229). In America it has been held that a cider mill attached by an iron brace to the walls of a building in which it stood was not a chattel, and the above decision of Comyns, C. B., was disapproved. *Wadleigh v. Janvrin*, 41 New Hampshire, 503.

(*o*) 1 H. Bl. 260, *in notis*. See a description of these

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above referred to, were utensils made of iron and rivetted together, brought in pieces, and capable of being again removed in pieces, without injury to the surrounding buildings; and they were not joined to the walls, but fixed with mortar to the brick floor. In deciding this case, as between the heir and executor of the owner in fee who had made the erection, Lord Mansfield alludes to several distinct arguments, quite unconnected with trade, and inapplicable to the case of landlord and tenant. But it may be observed that when he intimates his opinion, that as between the latter parties a tenant would be entitled to remove the salt pans, he seems to rest the right of removal principally upon the construction of the articles, and the little injury that would be occasioned to the estate by taking them away (*p*).

Dutch barns.

The above decisions were followed by the case of *Dean v. Allalley* (*q*). In this case a tenant during his term had erected certain sheds or buildings called Dutch barns. The construction of these buildings may be collected from the MS. note of counsel cited in the case of *Elwes v. Maw* (*r*); from which it appears that the sheds had a foundation of brick-work in the ground, and uprights fixed in and rising from the brick-work, and supporting the roof, which was composed of tiles, and the sides open. Lord Kenyon said, "If a tenant will build upon premises
 " demised to him a substantial addition to the house, or
 " add to its magnificence, he must leave his additions, at
 " the expiration of his term, for the benefit of his landlord;
 " but the law will make the most favourable construction
 " for the tenant where he has made necessary and useful
 " erections for the benefit of his trade or manufacture, and
 " which enable him to carry it on with more advantage.
 " It has been held so in the case of cyder mills, and in other

utensils in *Earl of Mansfield v.*
Turne, 6 Bing. N. C.
 and see *post*, p. 222.

(*p*) *Ante*, p. 52.

(*q*) 3 Esp. 11.

(*r*) 3 East, 38, 47.

“ cases ; and I shall not narrow the law, but hold erections
 “ of this sort, made for the benefit of trade, or constructed
 “ as the present, to be removable at the end of the term.”

Chap. II. s. 1.

It does not appear from the report of this case for what purpose the buildings in dispute had been erected. Nevertheless, the decision may undoubtedly be considered an authority for the tenant's right to remove similar erections made for the benefit of trade, and connected to the same extent with the freehold, whatever conclusion may be formed as to the grounds upon which the barns in question were held removable, with reference to the particular object for which they were put up (s).

In the case of *Fitzherbert v. Shaw* (t), Gould, J., was of opinion at nisi prius, that a tenant would clearly have been entitled to take away a wooden stable, standing upon blocks or rollers (u), and also a shed which he had built on brick-work, and some posts and rails he had put up (v). And although in this case the erections might not have been made by the tenant for the purpose of trade, still the same observation holds that has just been suggested in respect of the Dutch barns, viz., that the above learned judge's opinion is an authority for the removal of similar erections, if set up for trading purposes, because the tenant's privilege in respect of trade fixtures is, without dispute, greater than any other he could rely upon under

Sheds, posts,
and rails.

(s) Some doubts seem to have been entertained whether the parts of the buildings removed by the defendant were actually affixed to the soil, see *Elwes v. Maw*, 3 East, at p. 45 ; and see Lord Ellenborough's remarks upon the authority of this case, *id.* pp. 55, 56.

(t) 1 H. Bl. 258.

(u) It is stated in the report that the tenant had removed

this from an estate of his own adjoining the premises in question. The description of this article seems to be consistent with its being a chattel. See *ante*, p. 4.

(v) As to fences and hurdles, see *per* Sir John Cross in *Ex parte Belcher*, 2 Mont. & Ayr. 160, 169 ; *Tod's Trustees v. Finlay*, 10 M. 422 ; *Central, &c. Railroad Co. v. Fritz*, 27 Am. Rep. 175, 180.

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the law of fixtures. Perhaps, however, it may be objected to this authority (in conformity with Lord Ellenborough's view of it), that the opinion of Gould, J., was wholly extra-judicial, as the point could not properly have come before him at nisi prius (*w*).

A varnish
house.

In the case of *Penton v. Robart* (*x*), the Court considered that a tenant during his term would have been entitled to remove an erection used as a varnish house for carrying on a varnish manufactory. The building was described as having a brick foundation let into the ground, with a chimney belonging to it. Upon the foundation a wooden plate was laid, upon which a superstructure of wood, brought from another place, where the defendant, the tenant, had carried on his business, was raised, and the quarters belonging to the superstructure were mortised into the plate. The decision turned upon a point which will be explained in a subsequent section (*y*). With reference, however, to the present subject, it may perhaps be argued that, on the facts, the case does not amount to a general authority upon the tenant's right of removal. For it appears from the statement of the case, that, in point of fact, the erection which the defendant removed, and which gave rise to the dispute, was a part of the building only; for he took away only the wooden superstructure, which, according to the nisi prius report of the case, was merely placed upon a wooden plate laid upon the brick foundation. The foundation, and a chimney belonging to the building, were not removed. According to this view of the facts, the principle of fixtures would not be involved at all in the case. For, as was shown in the former chapter of this work, an erection constructed like that portion of the building which the tenant removed, is not to be considered a part of the freehold, but remains a mere personal

(*w*) *Elwes v. Maw*, 3 East,
at p. 55.

(*x*) 2 East, 88; S. C. 4
Esp. 33.

(*y*) *Post*, p. 130.

chattel (z). It must be observed, however, that the language of the judges seems hardly consistent with this view of the case, as the erection removed appears to have been treated throughout as a fixture; and, moreover, in subsequent cases *Penton v. Robart* has been always considered as a decision upon the right to remove *fixtures* (a). Chap. II. s. 1.

From a want, however, of an accurate examination of the circumstances of the case, *Penton v. Robart* has not unfrequently been supposed to authorise the removal of buildings of a more substantial nature than is warranted by any other decision. But assuming that the Court deemed the erection to be actually affixed, still the peculiar character and construction of the building will not admit of the case being considered an authority for a very extensive right on the part of the tenant.

Poole's case (b), it has been seen, was an action against the Sheriff for taking in execution the vats, coppers, tables, partitions, pavements, &c. of a soap-boiler; on which occasion Lord Holt held, that the soap-boiler might well remove the vats he set up in relation to trade. The mention of pavement in this case has often given rise to an opinion that such an article might always be removed if set up for trade. And it has been considered a strong instance in favour of an unqualified right in the tenant to take away every erection put up for trading purposes. But on an attentive perusal of the case, it will be found, that it is not clear from the statement, whether any pavement was Vats, coppers, &c.

(z) *Ante*, p. 4.

(a) But see the remarks of Monahan, C. J., in *Deeble v. M'Mullen*, 8 Ir. C. L. Rep. at p. 362.

(b) 1 Salk. 368. It is said in *Lady St. John v. Piott*, 2 Bulst. 102, *S. C. Cro. Jac.* 329, that pavement is a struc-

ture, for they take lime to finish it. Perhaps it may be thought that the pavement in *Poole's case* was accessory to the trade utensils, as being necessary to their more convenient use and enjoyment, as to which, see *post*, p. 63. Pavement.

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Substantial
buildings not
removable.

in fact removed; and indisputably the right of removing it cannot be relied upon as being established by any part of Lord Holt's judgment (c).

The doctrine of fixtures was considered in a very elaborate manner in the celebrated case of *Elwes v. Maw* (d); a very important decision, the grounds of which will be considered in the next section (e). Lord Ellenborough, throughout his judgment in that case, speaks of buildings constructed for the purpose of trade. The buildings there in question were substantial erections of brick and mortar having foundations deep in the soil; and it is worthy of remark, that it is an argument on which he principally relies, that the indulgence allowed to tenants in respect of trade had, by no valid authority, been extended to the particular description of buildings then in dispute, viz. buildings for agricultural purposes. The objection, therefore, in this case, did not arise out of the nature and structure of the buildings, but was considered to depend entirely upon their object and purpose. Accordingly, in *Whitehead v. Bennett* (f), it was argued, on the authority of the *dicta* in the last-mentioned case, that buildings made of brick with foundations let into the soil to some depth were removable by a tenant who had erected them for the purposes of his trade. It was held, however, by Kindersley, V.-C., that the mere fact that they were used only for the purpose of trade, did not entitle the tenant to remove buildings of this description. The learned judge said, "With respect to anything in the nature of machinery, engines, or plant, or things substantial and solid, such as vats, utensils, &c., these are all clearly within the right of removal as between landlord and tenant. In all these cases the things sought to be removed might either be taken away bodily, where they are capable of being set up again elsewhere, or, if by reason of their

(c) As to iron flooring plates p. 169 (8th ed.).
see *ante*, p. 4.

(d) 3 East, 38; 2 Sm. L. C. (e) *Post*, p. 73.

(f) 27 L. J., Ch. 474.

“ bulk or complexity it should be necessary to take them
 “ to pieces, they could be put together in the same form
 “ in some other place. . . . It certainly may be meta-
 “ physically argued from this that a building of the most
 “ substantial and solid character let ten feet into the ground
 “ with cement, is capable of removal brick by brick and of
 “ being put together in another place in the same form ;
 “ but the common sense of mankind would determine that
 “ an engine is a very different thing from a house, although
 “ every stone, brick, tile and chimney-pot might be re-
 “ moved ; one, however, is the case of removal of materials,
 “ and the other of taking to pieces and restoring to their
 “ former state actual portions of the engine” (g). This
 case, the authority of which has never been impugned,
 must be considered to have definitely settled the limits of
 a tenant’s rights in respect of buildings of this kind (h).

It was remarked by Lord Ellenborough, in the course
 of his judgment in *Elwes v. Mear* (i), that a building which
 is accessory to a removable utensil, is equally removable
 with the thing to which it is incident. But upon reference
 to the authorities upon which Lord Ellenborough based his
 opinion (j), it seems that Lord Hardwicke’s observations
 concerning the sheds and the walls of the fire-engine only
 amount to this,—that although by removing an utensil,
 its accessorial building may be impaired, such an injury
 shall not deprive a party of his right to remove the utensil
 itself. However, in the case above alluded to (k), Kinders-

Accessory
buildings.

(g) Approved in *Wake v. Hall*, 7 Q. B. D. 295, 301. And see *S. C.* in H. L., 8 App. Cas. at p. 208, per Lord Bramwell.

(h) As to removal of conservatories, greenhouses, &c. see *post*, p. 110.

(i) 3 East, at p. 53.

(j) *Lawton v. Lawton*, 3 Atk. 13, and *Lord Dudley v.*

Lord Warde, Amb. 113. It does not appear from either of the judgments in those cases, that the sheds over the engines were considered by Lord Hardwicke to be removable.

(k) *Whitehead v. Bennett*, 27 L. J., Ch. 474, 476. In the Scotch case of *Syme v. Harvey*, 24 D. 202, it was questioned whether a tenant was entitled

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ley, V.-C., seems to have considered that a shed might be removable as an accessory to that which it was constructed to cover, although he decided that an engine-house, built of brick and let into the soil, was not removable, saying that although it might, in some sense, be called an accessory to the engine, it was not a mere shed, and that if it were removable, the same rule would apply to a large factory, the machinery in which might be removed. And notwithstanding the limit to the privilege of a tenant in respect of accessory buildings, thus indicated by Kindersley, V.-C., the opinion of the learned Lords, who gave judgment in the very recent case of *Wake v. Hall* (*l*) in the House of Lords, appear to authorise the extension of the privilege even to substantial buildings of brick and stone (which as was stated above would not, from their construction, be removable *per se*), where they are but accessory to machinery placed therein, and built solely to cover and protect it. The facts of that case, as appears from the statement of them in a former place (*m*), were peculiar, but Lord Bramwell said that the principle on which a tenant might remove trade fixtures, would, if the miners had been tenants, have justified the removal of the buildings there in question (*n*). It is difficult, if not impossible, to say at what point an erection, from its nature and mode of construction, ceases to be a mere accessory to that which it covers. Probably the true test is, whether the building, after the removal of the principal, would be reasonably capable of being applied to further uses. It may, it is thought, be safely assumed that the House of Lords did not intend to extend the privilege to a building such as a factory, which certainly cannot be said to be a

to remove the brick walls upon which a removable greenhouse was erected. It was unnecessary in that case to decide the point; but two of the learned judges intimated that their

opinion might have been in favour of the tenant.

(*l*) 8 App. Cas. 195.

(*m*) *Ante*, p. 38.

(*n*) 8 App. Cas. at p. 210.

mere accessory to the machinery which it contains, nor even to a mere accessory where it could not be removed without great damage to the freehold (o). Chap. II. s. 1.

From an examination of the cases referred to in this chapter, it will be perceived, that with one exception, namely, the case of *Whitehead v. Bennett* (p), the construction of an article as affecting the privilege of removal, is only incidentally noticed by the Courts, and has not been the express point of decision (q). The language, however, used by the judges in some of these cases is deserving of attention, as it shows that they were by no means indifferent to arguments derived from the nature, structure, and mode of annexation of the fixture. With respect, indeed, to the inferences to be drawn from the actual decisions, it will have been observed that the cases are but few in number, and in several of them, the property in question was of a very peculiar description; but it may, at any rate, be inferred that, where an article annexed to the freehold cannot be severed without being entirely destroyed, a tenant will not be allowed to remove it.

Right of removal as affected by the construction of the article.

But there are other circumstances, besides those that relate to the construction of the thing affixed, which it may sometimes be necessary to take into consideration, in order to judge of the right of the tenant to remove trade erections. For, on a reference to the cases at large, it will be seen that the Courts have in their decisions been influenced by various arguments derived from the facts of each particular case. Thus, the existence of a custom in respect of the property in question;—the intention of the party in making an erection;—the injury occasioned to

Other circumstances affecting the right of removal.

Custom; injury to the premises, &c.

(o) *Post*, p. 69.

(p) *Ante*, p. 62.

(q) It is otherwise where the question is—Is the article

a fixture or a mere chattel? See the cases considered in Chap. I., *ante*, p. 6 *et seq.*

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the freehold by its removal;—and the comparative value to the respective claimants. These, or some of these considerations, are almost always adverted to in confirmation, if not as principal grounds of decision.

Custom or
usage.

For example, with regard to *custom*, Treby, C. J., in deciding the case of *Culling v. Tufnal* (*r*), relied altogether upon the usage of the country; though there certainly were other reasons upon which he might have supported the tenant's claim. Lord Mansfield evidently admits the effect of custom in respect of fixtures, for he is stated to have been of opinion, that the case of the cider mill was probably decided on that particular ground (*s*). In *Lawton v. Lawton* (*t*), however, where it was stated that it was customary to remove fire engines, Lord Hardwicke made no observation upon the circumstance; neither did he notice it in the subsequent case of *Lord Dudley v. Lord Warde* (*u*). Lord Ellenborough also, in a *nisi prius* case, alludes to the effect of custom, in giving the tenant a right to remove things, which, by the general law, as affixed to the freehold, belonged to the landlord (*v*). And in the case of *Davis v. Jones* (*w*), evidence was given that it was usual between out-going and in-coming tenants to value machines like those in dispute; and the Court thought, that such a practice might be taken to indicate the nature and character of the articles (*x*).

As considerable weight is often attached to the effect of custom or usage in trials at *nisi prius*, in questions relating

(*r*) Bul. N. P. 34.

(*s*) *Vide Lawton v. Salmon*, as reported in 3 Atk. 16, in *notis*.

(*t*) 3 Atk. 13.

(*u*) Amb. 113.

(*v*) *Watherell v. Howells*, 1 Camp. 227.

(*w*) 2 B. & Ald. 165, 168. See, however, the remarks, *ante*, p. 10.

(*x*) See Vin. Ab. tit. Exe-

cutors, p. 154; *Grymes v. Boweren*, 6 Bing. 437, 439; *Martyr v. Bradley*, 9 Bing. 24, 29; *Trappes v. Harter*, 2 Cr. & M. 153, 180; *Hubbard v. Bagshawe*, 4 Sim. 326; *Longbottom v. Berry*, L. R., 5 Q. B. 123, 136; *Day v. Austin and Bisbitch*, noted *ante*, p. 48, note (*p*). And see the cases cited in Chap. IV., *post*, p. 239.

to fixtures, it may be useful to add here a few remarks Chap. II. s. 1. upon the subject.

It must be remembered that a local custom strictly so called is not to be confounded with what is sometimes called "custom of the country," which generally means no more than the prevalent usage of the country where the lands lie (*y*). Nor is custom to be confounded with a mere usage of a particular trade (*z*). A local custom is the common law of the district in which it prevails, and it has therefore in that district the binding force of law (*a*); whereas the only effect of usage is to add an implied term to contracts in respect of those matters to which the usage has reference. A custom must be limited to some defined space of which the law takes cognizance, as, for instance, a county or a parish (*b*); and therefore the law will not recognize the usage of a particular private estate (*c*). Again, it is of the essence of a custom that it should be immemorial, and it will be defeated by evidence of non-existence within legal memory. As an instance of custom properly so called, the customs of the High Peak of Derbyshire, prior to their establishment by statute, may be referred to. Thus, it has been held in a very recent case (*d*), that a person engaging in mining operations by virtue of these customs, and erecting substantial stone and brick buildings, may remove them as against the landowner at any time whilst he continues to work the mine, or within a reasonable time after he has ceased to do so (*e*). The

Custom as distinguished from usage.

Essentials of custom.

(*y*) *Legh v. Hewitt*, 4 East, at p. 159; *Dalby v. Hirst*, 1 Brod. & Bing. 224.

(*z*) *Partridge v. Bank of England*, 9 Q. B. at p. 425.

(*a*) *Hammerton v. Honey*, 24 W. R. 603.

(*b*) *Legh v. Hewitt*, *supra*.

(*c*) *Womersley v. Dally*, 26 L. J., Ex. 219.

(*d*) *Wake v. Hall*, 8 App.

Cas. 195. It should be noticed that this was not a case governed by the law of fixtures as between landlord and tenant. See *ante*, p. 38.

(*e*) Upon custom generally, see Com. Dig. tit. Copyhold (S); Stephen's Commentaries, vol. 1, p. 55 *et seq.* (6th ed.); Broom's Common Law, p. 12 *et seq.* (5th ed.); Bullen &

Part I.**Essentials of usage.**

operation of custom, however, may be either expressly or impliedly excluded by the terms of a contract between landlord and tenant; if not so excluded it will of course bind them (*f*). On the other hand, a usage need not be immemorial, and to substantiate it it is sufficient if it appear to be so well known and acquiesced in, in other words, of such notoriety, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract (*g*). It follows from what has been said that a usage is dependent upon the existence of contract, from which alone it derives its binding force (*h*), whereas a custom is of an entirely independent nature, and operates as a law, unless excluded by contract.

The object of this species of evidence in cases between landlord and tenant is generally to establish a prevalent usage, with reference to which the claimants may be supposed to have contracted that relation. It is not necessary to prove that the usage has existed from time immemorial; but the effect and validity of the evidence will depend upon the length of time it has continued, the extent of the district or neighbourhood over which it prevails, and the absence of instances which show a contrary practice. The usage must be collected not from what the witnesses say they think it is, but from what was publicly done throughout the district (*i*). The evidence adduced in

Leake, *Prec. Pleadings*, p. 720 (3rd ed.); *Wigglesworth v. Dallison*, 1 Sm. L. C. p. 594 (8th ed.).

(*f*) *Hutton v. Warren*, 1 M. & W. 466, 474; *Roberts v. Barker*, 1 Cr. & M. 808.

(*g*) *Ghose v. Manickchand*, 7 Moo. Ind. App. 263, 282; *Grissell v. Bristowe*, L. R., 3 C. P. at p. 128.

(*h*) See *Dann v. City of London Brewery Co.*, L. R.,

8 Eq. 155, 162.

(*i*) *Tucker v. Linger*, 21 Ch. D. 18, 34, per Jessel, M. R. In this case (affirmed in H. L., 8 App. Cas. 508) it was held that a custom of the country for a tenant to remove and sell flints turned up in the course of ploughing was good, and was not excluded by the terms of a lease reserving to the lessor all "minerals."

proof of a custom of the country is frequently of a very loose and indefinite description; and the instances relied upon in support of it are often found, when properly inquired into, to have no other origin than the special agreements of parties (*j*). Chap. II. s. 1.

A decision upon the exclusive effect of custom or usage, in cases of trading and other fixtures, appears to be a desideratum in this branch of the law; since, among brokers and other practical men, it is frequently the only guide by which they are directed in making their appraisements, and in deciding disputes that are referred to them. In adopting a usage, such persons only profess to follow legal principles and authorities, by which they are necessarily bound, and therefore it is always a question for the Court whether their practice be in accordance with these (*k*). The parties, however, may be bound by a particular practice, although it be unreasonable, if they have so agreed (*l*).

With regard to the injury occasioned to the premises by the removal of things that have been affixed to them, it will be recollected that the distinctions taken in the old cases in favour of removing furnaces fixed to the floor and not to the walls, and doors which were not outer-doors, and other similar instances, proceeded upon the principle that the walls were not the worse, nor the house impaired Injury to the premises.

(*j*) As to injunctions for waste in removing things contrary to the custom of the country, see *Pratt v. Brett*, 2 Madd. 62; *Onslow v. —*, 16 Ves. 173; *Kimpton v. Eve*, 2 Ves. & Bea. 349, 352; *Bailey v. Hobson*, L. R., 5 Ch. 180. For a collection of agricultural customs in different parts of

the country, see Woodfall's *Landlord and Tenant* (12th ed.), p. 724.

(*k*) *Atwood v. Sellar*, 5 Q. B. D. 286, 289; *Whitecross Wire Co. v. Savill*, 8 Q. B. D. 653.

(*l*) *Stewart v. West India, &c. Steamship Co.*, L. R., 8 Q. B. 88.

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by taking them away (*m*). In *Lawton v. Lawton*, Lord Hardwicke said, that it was a very true maxim in the doctrine of fixtures, that the principal thing shall not be destroyed by taking away the accessory (*n*). And it is observable that when Lord Mansfield, in *Lawton v. Salmon*, admitted that a tenant would be entitled to remove salt pans, he seemed to rest his opinion principally upon the argument that the premises would come to the landlord in the same state as if they had never been erected (*o*). And so in the instance of the jibs in *Davis v. Jones*, the circumstance that neither the caps in which they were fixed nor the chief buildings would be injured by the removal, was stated as an additional reason for the judgment of the Court (*p*). The result of the decisions therefore seems to be, that if fixtures cannot be removed without material injury to the freehold the tenant has no right to inflict that injury, or to remove them at all (*q*). In all cases, however, injury to the freehold must be spoken of with less than literal strictness. To deprive a tenant of the right of removal there must be real injury to the premises, for *ex necessitate rei*, the severance of a fixture requires a certain amount of force, and even a screw or nail can scarcely be drawn without some attrition. Where, for instance, all the harm done is that which is unavoidable to mortar laid on brick walls, this is so trifling that the law, which is reasonable, will regard it as none (*r*).

(*m*) See Yr. Bk. 21 Hen. 7, p. 26; *Cooke's case*, Moore, 17; *ante*, pp. 47, 48.

(*n*) 3 Atk. 15. And see *Lord Dudley v. Lord Warde*, Amb. 114; *Avery v. Cheslyn*, 3 A. & E. 75; *Ex parte Barclay*, 5 D., M. & G. at p. 410. See also 2 Sm. L. C. 195 (8th ed.).

(*o*) 1 H. Bl. 260, *in notis*. See *ante*, pp. 52, 58.

(*p*) 2 B. & Ald. at p. 168.

And see *post*, p. 124, where will be found some remarks upon the liability of the tenant to repair damage occasioned to the freehold by putting up and taking down fixtures.

(*q*) *Gibson v. Hammersmith Rail. Co.*, 32 L. J., Ch. at p. 341; *Wake v. Hall*, 1 App. Cas. at p. 204, per Lord Blackburn.

(*r*) *Martin v. Roe*, 7 E. & B. 237, 242; *Parsons v. Hind*,

It will be found in like manner, on referring to the cases, that the other topics above mentioned, in respect of the intention of the parties, and the comparative value to the respective claimants, have been incidentally noticed by the Courts, either separately, or in combination with those that have been here particularly pointed out (s).

Chap. II. s. 1.

Intention and comparative value.

It is true, indeed, that some of these grounds of argument have been relied upon more especially in claims between other class of persons; and it is therefore difficult to say what degree of importance would be attached to them, in questions between landlord and tenant. But as they have so frequently been adverted to, and considered worthy of attention and inquiry in the judicial opinions, it would not in any case be safe to overlook them, in determining upon the right of a tenant in taking away trade erections.

From a review of the authorities that have been examined in the course of this section it will appear, that if any rule were to be laid down to serve as a guide in practice as between landlord and tenant, with respect to the right of removing annexations made for the purposes of trade, it would be necessary to express it in terms so guarded as not to clash with any of the grounds of decision which have been adverted to in the preceding remarks. The following rule, however, may perhaps be found to be most consistent with the adjudged cases. Things which a tenant has fixed to the freehold, for the purposes of trade or manufacture, may be taken away by him, wherever the

General observations as to right of removing trade fixtures.

14 W. R. 860, 862, per Mellor, J.; *Governors of Harrow School v. Alderton*, 2 Bos. & Pul. 86. See, also, *Redfern v. Smith*, 1 Bing. 382; and *post*, p. 354.

(s) See the cases of *Lawton v. Lawton*, and *Lawton v. Salmon*, *supra*; *Buckland v.*

Butterfield, 2 Brod. & Bing. 54; *Empson v. Soden*, 4 B. & Ad. 655; *Niven v. Pitcairn*, 2 S. 271; *Syme v. Harvey*, 24 D. 202. As to intention that an article shall remain a chattel, though affixed to the freehold, see *ante*, Chap. I., p. 26.

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removal is not contrary to any prevailing practice ; where the articles can be removed without causing material injury to the estate ; and where, in themselves, they were of a perfect chattel nature before they were put up, or at least have in substance that character independently of their union with the soil ; or, in other words, where they may be removed without being entirely demolished, or losing their essential character or value. If an erection, put up in relation to trade, can be severed without violating any one of these conditions, it may very safely be affirmed, that whatever be its magnitude, construction or mode of annexation, it is a fixture which a tenant is privileged to remove. It is not, however, meant to be inferred, that because in any particular instance these circumstances do not all concur, that therefore an article cannot be removed by the tenant. On the contrary, it is not inconsistent with some of the decisions to say that things may be removable, although these requisites are not completely fulfilled. The rule, therefore, here proposed is only offered as an affirmative one ; that wherever the above-mentioned circumstances do concur, that there an article may confidently be pronounced to belong to the tenant. And although it may be thought that this rule is too narrow to be of much practical utility, still no other could safely be laid down ; because, upon looking into the judgments of the Courts, it is impossible not to see, that in a disputed claim between landlord and tenant, the absence of any one of the requisites which have been mentioned might with propriety be urged against the exercise of the tenant's right (*t*).

(*t*) For a summary view of the particular articles which have been held to belong to a tenant upon the authority of the cases detailed at length in this section, the reader

may refer to Appendix (B), where they are collected and arranged with reference to the manner in which questions upon this subject usually occur in practice.

SECTION II.

Of the Right of a Tenant to remove Things set up for Agricultural Purposes.

It was decided in the year 1802, in a case of great importance, upon which much deliberation was bestowed, that the privilege established in favour of tenants in trade did not extend to agricultural tenants, so as to entitle them to remove things which they had erected for the purposes of husbandry; although they left the premises in the exact state in which they found them on their entry. The importance of this decision requires that it should still be considered at some length, although its bearing upon the position of agricultural tenants has been greatly diminished by the effect of subsequent legislation, and in particular by the provisions of the Agricultural Holdings (England) Act, 1883 (a).

Chap. II. s. 2.

Privilege in respect of trade did not extend to agricultural erections.

The case is that of *Elwes v. Maw* (b) in the King's Bench. It was an action by an owner in fee against his tenant, for injury caused to the reversion by the removal of certain buildings and erections placed by the defendant on the demised premises. At the trial a verdict was found for the plaintiff, subject to the opinion of the Court on a special case:—The defendant occupied a farm under a lease from the plaintiff for 21 years; which lease contained a covenant on the part of the tenant to keep and deliver up in repair the messuage, barn, stables and out-houses, and other buildings belonging to the demised premises. About 15 years before the expiration of the lease, the defendant erected upon the farm, at his own expense, a substantial beast-house, a carpenter's shop, a fuel-house, a

Elwes v. Maw.

(a) 46 & 47 Vict. c. 61, (b) 3 East, 38.
post, p. 79.

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cart-house, a pump-house, and a fold-yard. The buildings were of brick and mortar, and tiled, and the foundations were about one foot and a half deep in the ground. The carpenter's shop was closed in, and the other buildings were open to the front, and supported by brick pillars. The fold-yard wall was of brick and mortar, and its foundation was in the ground. The defendant, previous to the expiration of his lease, pulled down the erections, dug up the foundations, and carried away the materials, leaving the premises in the same state as when he entered upon them. These erections were necessary and convenient for the occupation of the farm, which could not be well managed without them. The question for the opinion of the Court was, whether the defendant had a right to take away such erections.

Judgment of
King's Bench
in *Elwes v.*
Maw.

The case was twice argued before the Court at considerable length; and in the result judgment was given for the plaintiff. Lord Ellenborough, who delivered the judgment of the Court, after tracing the progress of the exceptions to the general rule that, wherever a lessee who has annexed anything to the freehold, afterwards takes it away, it is waste, says;—"But no adjudged case has yet gone the length of establishing that buildings subservient to purposes of agriculture, as distinguished from those of trade, have been removable by an executor of tenant for life, nor by the tenant himself who built them during his term." His Lordship next examines the grounds of the decisions in the three principal cases upon the subject; viz. *Lawton v. Lawton* (c); *Lord Dudley v. Lord Warde* (d); and *Lawton v. Salmon* (e). These, and also the cider-mill case before Comyns, C. B. (f), he considers to have been decided mainly upon the ground, that notwithstanding the fire-engines and the cider-mill were

(c) 3 Atk. 13.

(d) Amb. 113.

(e) 1 H. Bl. 260, *in notis.*

(f) See these cases referred to, *ante*, p. 51 *et seq.*

erected for the enjoyment of the profits of land, yet they were accessory to a species of trade, a matter of a personal nature. He intimates an opinion, that in *Laulton v. Salmon*, Lord Mansfield did not consider the salt-pans as accessory to the carrying on a trade; and adds that if he had, “still it would not have affected the question before the Court, which is the right of a tenant, *for mere agricultural purposes*, to remove buildings fixed to the freehold, which were constructed by him for the ordinary purposes of husbandry, and connected with no description of trade whatsoever.” Chap. II. s. 2.

Lord Ellenborough then enters upon a critical examination of the authorities which had been urged in support of the defendant's claim (*g*), and distinguishes them from the case before the Court. His Lordship concludes thus—
 “The case of buildings for trade has been always *put and recognized as a known allowed exception* from the general rule which obtains as to other buildings; and the circumstance of its being so treated and considered, establishes the existence of the general rule, to which it is considered as an exception. To hold otherwise, and to extend the rule in favour of tenants *in the latitude contended for* by the defendant, would be, as appears to me, to introduce a dangerous innovation into the relative state of rights and interests holden to subsist between landlords and tenants. But its danger, or probable mischief, is not so properly a consideration for a court of law, as whether the adoption of such a doctrine would be an innovation *at all*; and, being of opinion that it would be so, and contrary to the uniform current of legal authorities on the subject, we feel ourselves, in conformity to, and in support of those authorities, obliged

(*g*) Viz., *Dean v. Allalley*, *Shaw*, 1 H. Bl. 258; *Penton v. Robart*, 2 East, 88. 3 Esp. 11; *Culling v. Tufnal*, Bul. N. P. 34; *Fitzherbert v.*

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“ to pronounce that the defendant had no right to take
“ away the erections stated and described in this case.”

Result of de-
cision in *Elwes*
v. *Maw*.

Such was the decision in the case of *Elwes v. Maw*. It established an unqualified rule, which excluded *agricultural* tenants from participating in the advantages possessed by tenants in trade in regard to fixtures (*h*). And the distinction upon which this rule is founded must still be attended to in practice; for although, as has been said, the effect of this decision has been greatly diminished by legislation, yet, as will be hereafter seen, it is important to bear in mind the distinction between the position of agricultural tenants at common law, and that which they occupy by virtue of statutory provisions in their favour. It may, however, be observed of this decision, that it was the first in which any distinction between trading and agricultural erections was made by the Courts: at least in no previous case had it been laid down, that the exception in favour of trade implied a negative rule, to the exclusion of every article not strictly subservient to trade. The decision appears, moreover, to stand opposed to opinions indirectly expressed, but of high authority, and which had immediate reference to the subject of the profits arising from land. And although it has been adverted to in subsequent judgments of the Courts with great respect, on account of the important matters it contains, yet it has not been followed by any determination, in which the general principle of public benefit and convenience has received the same restriction (*i*). It is not intended to intimate any doubt respecting the validity of this decision, as an existing authority of law, in cases not subject to the operation of the recent legislation to be now referred to,

(*h*) The principle of the decision in *Elwes v. Maw* clearly extends to all agricultural fixtures, and not only

to buildings.

(*i*) For further remarks upon the decision in *Elwes v. Maw*, see Appendix (E).

Indeed, it is to be noticed that even the exception in favour of trade would not have permitted the tenant to have removed substantial erections of the kind there in question (*j*). But it is thought of importance to draw the reader's attention to the grounds of the determination; because it will assist him in the practical application of the rule established by this case, and will be of material use in the discussion of questions relating to the class of fixtures treated of in the ensuing section.

The law as settled by *Elwes v. Mau*, viz., that a tenant was not entitled to remove fixtures for agricultural purposes, remained unaltered until 1851. In that year it was considered advisable to mitigate the severity of the law in this respect, and the Legislature passed the statute 14 & 15 Vict. c. 25, sect. 3 of which is as follows:—

Alterations in tenants' rights effected by 14 & 15 Vict. c. 25, s. 3.

“That if any tenant of a farm or lands shall, after the passing of this Act, with the consent in writing (*k*) of the landlord for the time being, at his own cost and expense, erect any farm-building, either detached or otherwise, or put up any other building, engine (*l*), or machinery, either for agricultural purposes or for the purposes of trade and agriculture (*m*), (which shall not have been erected or put up in pursuance of some obligation in that behalf,) then all such buildings, engines, and machinery shall be the property of the tenant, and shall be removable by him (*n*), notwithstanding the same may consist of separate buildings, or that the same or any part thereof may be built in or permanently fixed to the soil, so as the tenant making any such removal do not in anywise injure the land or buildings belonging to the landlord, or otherwise do put the same in like plight and condition, or as good plight and condition, as the same were in before the erection of anything so removed: Provided nevertheless, that no tenant shall, under the provision last aforesaid, be entitled to remove any such

(*j*) *Ante*, p. 62.

(*k*) No particular form of consent is necessary; but for a suggested form, see Woodfall's Landlord and Tenant (12th ed.), App. (C), p. 903.

(*l*) See *post*, p. 91; and *Allen v. Thompson*, L. R., 5

Q. B. 336, 339, per Blackburn, J.

(*m*) As to mixed cases, see *post*, p. 97 *et seq.*

(*n*) See the observations on the corresponding provisions in 46 & 47 Vict. c. 61, s. 34, *post*, pp. 92, 93.

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“matter or thing as aforesaid without first giving to the
 “landlord or his agent one month’s previous notice in writing
 “of his intention so to do; and thereupon it shall be lawful
 “for the landlord, or his agent on his authority, to elect to
 “purchase the matters and things so proposed to be removed,
 “or any of them, and the right to remove the same shall
 “thereby cease, and the same shall belong to the landlord;
 “and the value thereof shall be ascertained and determined
 “by two referees, one to be chosen by each party, or by an
 “umpire to be named by such referees, and shall be paid or
 “allowed in account by the landlord who shall have so elected
 “to purchase the same” (o).

Provisions of
 14 & 15 Vict.
 c. 25, s. 3,
 considered.

It will be noticed that this section does not apply to all fixtures, but only to buildings, engines, and machinery, and that the rights of removal conferred on the tenant (extending even to permanent and substantial buildings), are dependent upon his having obtained the written consent of the landlord. It would seem that the wording of the section implies that the consent required must be given previously to the erection of the article in question, although that is not expressed in terms (*p*); and, therefore, “the landlord for the time being” must mean the landlord at the time when the erection is put up. If this be so, any subsequent assent of a landlord to the existence of an erection on the demised premises would not satisfy the requirements of the section, whatever rights it might give to the tenant against such landlord personally. It should also be noticed that the applicability of this section is not confined to any class of tenant, or to farms or lands of any particular extent. Although the operation of the above section has been in great measure superseded by

(o) This Act extends to Ireland, but not to Scotland (sect. 5). The section above set out was not repealed by 23 & 24 Vict. c. 154, s. 104, as regards Ireland; but see the powers conferred upon tenants by sect. 17 of that Act.

(*p*) Compare 46 & 47 Vict. c. 61, s. 3, *post*, p. 84. It has been held that where consent to marriage has been required, a consent subsequent to the marriage is not sufficient. See the cases in Williams on Executors, p. 1284 (8th ed.).

the wider provisions of subsequent Acts, yet it remains unrepealed, and it is not altogether improbable that in some cases resort may still be made to its provisions where a tenant enjoys no right of removal under the Agricultural Holdings Act, 1883 (*q*). Chap. II. s. 2.

A more extensive alteration of the law was contemplated by the Agricultural Holdings (England) Act, 1875 (*r*), but as this Act contained an express saving of the rights of landlords and tenants to enter into any such agreements as they thought fit (*s*), its operation was very generally excluded by contract; and in view of its repeal and re-enactment in an amended form by the Agricultural Holdings (England) Act, 1883 (*t*), it becomes unnecessary for our present purpose to further discuss its provisions. Agricultural Holdings Act, 1875.

The most extensive alteration of law in this country in favour of agricultural tenants is that which has been effected by the Agricultural Holdings (England) Act, 1883 (*t*), which comes into force on the 1st of January, 1884 (*u*), but does not extend to Scotland or Ireland (*v*). It would be beyond the scope of the present treatise to enter into an exhaustive examination of the provisions of this statute, the language of which in many instances gives rise to considerable difficulty. It will be sufficient to give a sketch of the general scheme of the Act, examining closely only those sections which are material to our subject. It is proposed, therefore, to consider:—(1) The Agricultural Holdings Act, 1883.

(*q*) See *post*, p. 96.

(*r*) 38 & 39 Vict. c. 92, amended, as to ecclesiastical lands, by 39 & 40 Vict. c. 74.

(*s*) Sect. 54.

(*t*) 46 & 47 Vict. c. 61. See the Act *in extenso* in Appendix (F). Sect. 62 repeals (with the savings therein mentioned) 38 & 39 Vict.

c. 92, and 39 & 40 Vict. c. 74.

(*u*) Sect. 53.

(*v*) Sect. 64. As to Scotland, see the similar provisions of the Agricultural Holdings (Scotland) Act, 1883, 46 & 47 Vict. c. 62. As to Ireland, see *ante*, p. 78, note (*o*).

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application of the Act; (2) the rights of tenants thereunder; (3) the procedure prescribed for enforcing those rights.

To what lands
the Act ap-
plies.

First as to its application, the Act extends to land belonging to the Sovereign in right of the Crown, or of the Duchy of Lancaster, and also to lands belonging to the Duchy of Cornwall (*w*). The Act applies, however, only to holdings (*x*) which are either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or to those which are in whole or in part cultivated as market gardens (*y*); although it applies to such holdings whatever be their size.

Who are land-
lords within
the Act.

Next as to the persons who come under the operation of the Act. The provisions relative to landlords apply to all persons for the time being entitled to receive the rents and profits of any holding (*z*); and subject to the provisions of the Act in relation to Crown, Duchy, Ecclesiastical and Charity lands (*a*), a landlord, whatever may be his estate or interest in his holding, may give any consent, make any agreement, or do or have done to him any act in relation to improvements in respect of which compensation is payable under the Act, which he might give, or make, or do or have done to him, if he were in the case of an *estate of inheritance* owner thereof in fee, and in the case of a leasehold possessed of the whole estate in the leasehold (*b*). It is noticeable that *in terms* the above illustrations do not include tenants for life, and it is perhaps questionable whether the term *freehold estate*, rather than

(*w*) Sects. 35—37.

(*x*) "Holding" is defined as meaning "any parcel of land held by a tenant." Sect. 61.

(*y*) Sect. 54. And see, further, as to nurserymen, Sect. 100.

Sect. 61. By the same terms landlord and to continue appli-

cable until the conclusion of any proceedings for compensation under the Act, or under any agreement made in pursuance of the Act. As to landlords who receive the rents in any character otherwise than for their own benefit, see sect. 31.

(*a*) See sects. 35—40.

(*b*) Sect. 42.

estate of inheritance, would not have better expressed what may be presumed to have been the intention of the Legislature; namely, the removing of any doubts as to the powers of landlords who are limited owners. Chap. II. s. 2.

With respect to tenants, the Act applies to every holder of land under a landlord for a term of years, or for lives, or for lives and years, or from year to year (*c*). Unlike the Act of 1875, however, the present Act does not apply to tenancies at will (*d*); nor does it apply to a tenant to whom a holding is let during his continuance in any office, appointment or employment held under the landlord (*e*). Therefore in cases where the tenancy is dependent upon continuance in the landlord's employment, and in the case of a tenancy at will, the right (if any) of the tenant, apart from contract, to remove agricultural erections, must, for the future, depend upon the provisions of 14 & 15 Vict. c. 25, s. 3 (*f*). So too, in the case of tenants for one year or for less than a year.

Who are
tenants within
the Act.

In order to prevent the provisions of the Act as to compensation to the tenant being excluded by contract, as was so generally the case under the Agricultural Holdings Act, 1875, it is provided by sect. 55 that any contract, agreement or covenant made by a tenant, by virtue of which he is deprived of his right to claim compensation under the Act (except an agreement providing such compensation as is by the Act permitted to be substituted (*g*)), shall, so far

Contracts to
exclude the
application
of Act.

(*c*) Sect. 61. The same section provides that the term *tenant* is to include executors, administrators, assigns, legatee, devisee or next of kin, husband, guardian, committee of the estate, or trustees in bankruptcy of a tenant, or any person deriving title from a tenant; and that the right to receive compensation in respect of any improvement

made by a tenant shall enure to the benefit of such persons.

(*d*) See 38 & 39 Vict. c. 92, s. 4.

(*e*) Sect. 54.

(*f*) *Ante*, p. 77. But see sect. 62 of the present Act as to the saving of rights under the Agricultural Holdings Act, 1875.

(*g*) See sects. 3—5.

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as it deprives him of such right, be void. But, subject to the provisions of the Act, there is an express saving of any rights under any other Act or law, or under any custom of the country (*h*), or otherwise, in respect of (*inter alia*) improvements, waste (*i*), emblements (*j*), away-going crops or fixtures (*k*).

Rights conferred upon tenants by the Act.

We now proceed to consider shortly what are the rights of tenants under the Act. Speaking generally, the rights conferred upon a tenant are of two kinds. First, a right on quitting his holding at the determination of a tenancy (*l*) to compensation from the landlord in respect of certain improvements specified in the first schedule to the Act. Secondly, a right, with certain provisos, to remove fixtures and buildings *for which he is not entitled to compensation*, and which are not affixed or erected by him in pursuance of an obligation in that behalf, or instead of a fixture or building belonging to the landlord (*m*).

Tenant's right to compensation.

With respect to the tenant's right to compensation, sect. 1 provides that where a tenant has made on his holding any improvement comprised in the first schedule to the Act he shall, after the commencement of the Act (*i. e.*, January 1, 1884), be entitled, on quitting his holding at the determination of a tenancy (*n*), to obtain from the

(*h*) As to custom generally, see *ante*, p. 67.

(*i*) As to waste, see *post*, p. 351 *et seq.*

(*j*) As to emblements, see *post*, p. 265 *et seq.*

(*k*) Sect. 60.

(*l*) "Determination of tenancy" means the cesser of a contract of tenancy by reason of effluxion of time, or from any other cause (sect. 61). By sect. 58, it is provided that a tenant who has remained in his holding during change or changes of te-

nancy is not thereafter on quitting his holding at the determination of a tenancy to be deprived of his right to claim compensation in respect of improvements by reason only that such improvements were made during a former tenancy or tenancies, and not during the tenancy at the determination of which he is quitting. See *post*, p. 156 *et seq.*

(*m*) As to this, see *post*, p. 88.

(*n*) Note (*l*), *supra*.

landlord, as compensation under the Act for such improvement, such sum as fairly represents the value of the improvement to an incoming tenant. But in estimating such value there is not to be taken into account, as part of the improvement made by the tenant, what is justly due to the inherent capabilities of the soil. This proviso, clearly intended as it is to place some limit upon the amount of compensation to which the tenant is to be entitled, will probably give rise to considerable discussion hereafter, owing to the ambiguity of the phrase "inherent capabilities of the soil." But as this question will in general arise in estimating the value of improvements other than those which form the principal subject of this work—viz., erections and fixtures—discussion upon this point would, it is thought, be out of place in these pages.

Chap. II. s. 2.

The Act has practically divided the improvements executed by the tenant into three classes, of which the first and second (described in Parts I. and II. of the first schedule to the Act) alone fall within the scope of the present treatise. These classes, to which, therefore, the following remarks are confined, consist of the under-mentioned improvements:—

Improvements
specified in
the Act.

CLASS I.

- Erection or enlargement of buildings ;
- Formation of silos ;*
- Laying down of permanent pasture ;
- Making and planting of osier beds ;
- Making of water meadows or works of irrigation ;
- Making of gardens ;
- Making or improving of roads or bridges ;
- Making or improving of watercourses, ponds, wells, or reservoirs, or of works *for the application of water power* or for supply of water for agricultural or domestic purposes ;
- Making of fences ;

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Planting of hops ;
 Planting of orchards *or fruit bushes* ;
 Reclaiming of waste land ;
 Warping of land ;
Embankment and sluices against floods.

CLASS II.

Drainage (o).

Compensation
for improve-
ments before
the Act.

With respect to the tenant's right to compensation for the above improvements, the Act has drawn a line between those which are executed prior to the commencement of the Act, and those which are subsequently executed. Thus, as regards the former improvements, sect. 2 provides that compensation under the Act is not to be payable in respect of them. The only exception to this is the case of improvements executed since December 31, 1873, for which the tenant is not entitled to compensation under any contract, or custom, or under the Agricultural Holdings Act, 1875, and to the making of which the landlord has, prior to January 1, 1885, consented in writing. In such a case the tenant, on quitting his holding at the determination of his tenancy after the commencement of the Act, may claim compensation thereunder in the same manner as if it had been in force at the time of the execution of the improvement.

Compensation
for improve-
ments after
the Act.

Next, in respect of any of the above specified improvements executed after the commencement of the Act, it is provided (p) that, in respect of the first class, compensation under the Act is not to be payable, unless the landlord, or his agent duly authorized in that behalf, has previously to the execution of the improvement, and after

(o) The improvements in italics in Class I. were not included in the first class of improvements in the Agricultural Holdings Act, 1875

(38 & 39 Vict. c. 92, s. 5).
On the other hand, drainage was so included.

(p) Sect. 3.

the 25th of August, 1883, consented in writing to the making of such improvement. The landlord's consent may be given upon such terms as may be agreed upon between him and the tenant; and in the event of an agreement any compensation payable thereunder will be substituted for compensation under the Act. Whilst, with regard to the second class, viz. drainage, the tenant cannot claim compensation for it under the Act unless he has, not more than three months and not less than two months before beginning to execute such improvement, given to the landlord, or his agent duly authorized in that behalf, notice in writing (*q*) of his intention to do the work, and of the manner in which he proposes to do it (*r*). But the landlord and tenant may, if they think fit, dispense with such notice and agree as to the terms upon which the drainage is to be executed; or, unless the tenant withdraws his notice, the landlord may execute the work and recoup himself for his expenditure by the charge of an annual sum upon the tenant (*r*). It will be seen that, for the purposes of consent and receipt of notice under the foregoing provisions, the Act provides that the landlord may be represented by his agent "duly authorized in that behalf." These words, it is clear, do not necessitate that the agent should be specially authorized for those purposes, and, therefore, any person charged by the landlord with the general management of his estates may, it seems, give the consent or receive the notice specified. On the other hand, a mere rent collector could not do so.

Chap. II. s. 2.

Authority of
landlord's
agent.

Sect. 5 contains a reservation of obligations under contracts existing at the commencement of the Act. It provides, that in the case of tenancies under contracts of tenancy (*s*), current at the commencement of the Act

Contracts
existing at
commence-
ment of Act.

(*q*) As to service of notices,
&c., see sect. 28.

(*r*) Sect. 4.

(*s*) "Contract of tenancy"

means a letting of or agree-
ment for the letting land for
a term of years, or for lives,
or for lives and years, or

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(1st January, 1884), where any agreement in writing, or custom, or the Agricultural Holdings Act, 1875, provides specific compensation for any of the above improvements, such compensation shall be substituted for compensation under the Act, notwithstanding that the improvement was executed upon or after that date. And by sect. 57, wherever a tenant is not entitled to compensation under the Act, he may recover compensation under any other Act of Parliament, or any agreement or custom, in the same manner as if the Act had not passed.

Improvements
begun during
last year of
tenancy.

A tenant is not to be entitled to compensation in respect of any of the above improvements begun during the last year of the tenancy, or after notice to quit; except (a) where a tenant from year to year has begun such improvement during the last year of his tenancy, and in pursuance of a notice to quit *thereafter* given by the landlord, has quitted his holding at the expiration of that year; and (b) where a tenant, whether a tenant from year to year or a lessee, previously to beginning any such improvement, has served notice on his landlord of his intention to begin the same, and the landlord has either assented, or has failed for a month after the receipt of the notice to object to the making of the improvement (*t*). It must be noticed that the section does not purport to confer any right to compensation in cases where

from year to year (sect. 61). See *ante*, p. 81. The same section provides, that a tenancy from year to year under a contract of tenancy current at the commencement of the Act shall for the purposes of the Act be deemed to continue to be a tenancy under a contract of tenancy current at the commencement of the Act until the first day on which either the landlord or

tenant of such tenancy could, the one by giving notice to the other, immediately after the commencement of the Act, cause such tenancy to determine, and on and after such day as aforesaid shall be deemed to be a tenancy under a contract of tenancy beginning after the commencement of the Act.

(*t*) Sect. 59. As to service of notices, see sect. 28.

the tenant would not have been entitled to it if the improvement had been executed in any previous year of the tenancy. Therefore, under the second of the above exceptions, a failure by the landlord to object to the making of the improvement will not be equivalent to the previous consent required by sect. 3 (*u*), in respect of improvements of the first class. And conversely, the general consent of a landlord to the execution of an improvement at *any* indefinite time, will not be sufficient to dispense with the notice required in the above exception. An incoming tenant who has with the written consent of the landlord paid to an outgoing tenant compensation under the Act for improvements, is, in respect of compensation for such improvements, to be in the same position as the outgoing tenant would have been in if he had remained tenant and quitted the holding at the time when the incoming tenant quits (*v*).

Chap. II. s. 2.

Incoming
tenant pur-
chasing im-
provements.

Sect. 6 contains regulations for estimating the amount of compensation payable to the tenant in respect of improvements. We have seen (*w*) that the amount of compensation in respect of improvements is to be the sum representing the value of the improvements to an incoming tenant. But the above section provides that in the ascertainment of the amount, in the case of those improvements with which we are concerned (*x*), the following matters are to be taken into account by way of reduction:—

Ascertain-
ment of com-
pensation.

(A.)—Any benefit which the landlord has given or allowed to the tenant in consideration of the tenant executing the improvement; and

Benefits given
by landlord.

(B.)—Any sums due to the landlord in respect of rent, or in respect of any waste committed or permitted by the tenant, or in respect of any breach of covenant or other agreement connected with *the* contract of tenancy com-

Waste or
breaches of
covenant by
tenant.

(*u*) *Ante*, p. 84.
(*v*) Sect. 56.

(*w*) *Ante*, p. 83.
(*x*) *Ante*, p. 83.

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mitted by the tenant, also any taxes, rates and tithe rent-charge due or becoming due in respect of the holding to which the tenant is liable as between him and the landlord.

Breach of
covenant by
landlord.

Whilst, on the other hand, there is to be taken into account in augmentation of the tenant's compensation:—

(C.)—Any sum due to the tenant for compensation in respect of a breach of covenant or other agreement connected with a contract of tenancy and committed by the landlord (x).

Breaches of
agreements
not under
seal.

It has been suggested under the Agricultural Holdings Act, 1875, that the corresponding provisions in sects. 18 and 19 of that Act, as to "breach of covenant or other agreement," gave no right to compensation for breaches of contracts not under seal; and that construction, if correct, would, of course, apply to the like words in the above section. It is thought, however, that this is not so, as the particular word "covenant" exhausts the *genus* of contracts under seal (y), and, therefore, the general words "other agreement" must refer to some larger *genus*, namely, contracts not under seal (z). The present section also provides that nothing in it is to enable a landlord to obtain *under the Act* compensation in respect of waste by the tenant, or of breach by the tenant committed or permitted in relation to a matter of husbandry, more than four years before the determination of the tenancy. This will not, of course, shorten the period within which the landlord may exercise his common law right of action in respect of waste or breaches of covenant.

Limitation of
time for land-
lord's claims.

Tenant's
right of re-
moving fix-
tures and

Besides the right to compensation for improvements the Act confers upon tenants a right of removing buildings

(x) It seems that the *landlord's* breach may relate to a different holding.

(y) See Com. Dig. tit. Co-

venant (A. 2).

(z) See per Willes, J., in *Fenwick v. Schmalz*, L. R., 3 C. P. at p. 315.

and fixtures for which there is no right to compensation. Chap. II. s. 2.
 This right of removal is conferred by sect. 34, which, as buildings
 being framed with a view of altering the law laid down under Agri-
 in the important case of *Elwes v. Mau*, already noticed (a), cultural
 deserves careful consideration. It is as follows:— Holdings Act,
1883.

“ Where after the commencement of this Act a tenant
 “ affixes to his holding any engine, machinery, *fencing*, or
 “ other fixture, *or erects any building* for which he is not under
 “ this Act or otherwise entitled to compensation, and which is
 “ not so affixed *or erected* in pursuance of some obligation in
 “ that behalf or instead of some fixture *or building* belonging
 “ to the landlord, then such fixture *or building* shall be the
 “ property of and be removable by the tenant *before or within*
 “ *a reasonable time after the termination of the tenancy.* ”

“ Provided as follows:—

“ 1. Before the removal of any fixture *or building* the
 “ tenant shall pay all rent owing by him, and shall
 “ perform or satisfy all other his obligations to the
 “ landlord in respect to the holding: ”

“ 2. In the removal of any fixture *or building* the tenant
 “ shall not do any avoidable damage to any *other*
 “ building or other part of the holding: ”

“ 3. Immediately after the removal of any fixture *or build-*
 “ *ing* the tenant shall make good all damage occa-
 “ sioned to any *other* building or other part of the
 “ holding by the removal: ”

“ 4. The tenant shall not remove any fixture *or building*
 “ without giving one month's previous notice in
 “ writing to the landlord of the intention of the
 “ tenant to remove it: ”

“ 5. At any time before the expiration of the notice of
 “ removal the landlord, by notice in writing given
 “ by him to the tenant, may elect to purchase any
 “ fixture *or building* comprised in the notice of
 “ removal, and any fixture *or building* thus elected
 “ to be purchased shall be left by the tenant, and
 “ shall become the property of the landlord, who
 “ shall pay the tenant the fair value thereof to an
 “ incoming tenant of the holding; and any differ-
 “ ence as to the value shall be settled by a refer-
 “ ence under this Act, as in case of compensation
 “ (but without appeal)” (b).

(a) See *ante*, p. 73.

(b) The passages in italics the provisions of the present
 are new; but, subject to this, section are similar to those of
 sect. 53 of the Agricultural

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Comparison
with rights
under former
Acts.

It will be at once noticed that this section differs from the corresponding provision in 14 & 15 Vict. c. 25, s. 3 (c), in that the consent of the landlord is no longer a condition precedent to the tenant's right of removal; also that it differs from the corresponding provision in sect. 53 of the Agricultural Holdings Act, 1875 (d), in no longer requiring in respect of a steam engine, notice of the tenant's intention to erect it. Again, following the precedent of the earlier Act, but differing in this respect also from the Act of 1875, the present section gives a right to remove buildings as well as fixtures. Further, as in the last-mentioned Act, the right of removal is confined to cases where the tenant is not under the Act or otherwise entitled to compensation.

What fixtures
tenant entitled
to remove.

In considering this section the question at once arises—Has it given the tenant a right to remove every species of fixture, or only such as are *ejusdem generis* with engines, machinery and fencing? It is clear that the Legislature has not used the term "fixture" in its strict sense; and, therefore, if standing alone, it would seem to comprise anything of a personal nature affixed to the land (e). But, following the general rule of construction, it is thought that the right of removal must be limited to fixtures of the same nature as those specified (f). Probably, however, these in-

Holdings Act, 1875, with the exception of the requirement in that Act of notice to the landlord of the intended erection of a steam engine.

(c) *Ante*, p. 77.

(d) 38 & 39 Vict. c. 92.
See note (b), *supra*.

(e) *Ante*, p. 2.

(f) "The object of enumeration is to set forth in detail things which are in themselves so distinct that they cannot conveniently be comprehended under one or

" more general terms; and
" there is in my opinion no
" *a priori* presumption that
" the things enumerated are
" all of them of the same
" kind. When a specific
" enumeration concludes with
" a general term, that term
" is by a well-known canon
" of construction held to be
" limited to *alia similia*." Per
Lord Watson in *Countess of
Rothes v. Kirkcaldy Water-
works Commissioners*, 7 App.
Cas. at p. 706.

clude all those which are most commonly in use in connection with agriculture. Upon this point it may be noticed that the word engine, at least, is capable of a somewhat wide construction, and may include a device or contrivance, although not perhaps of a strictly mechanical nature (*g*). Chap. II. s. 2.

Pursuing the comparison between the corresponding provisions in the two earlier Acts, and those in the section now under discussion, it will be seen that in the latter there is no mention of the purposes for which the fixture or building may be put up or erected. In this respect the Act resembles that of 1875, and differs from sect. 3 of 14 & 15 Vict. c. 25, which expressly provided that the buildings, engines, or machinery should be erected or put up either for agricultural purposes, or for the purposes of trade and agriculture. It may be noticed also that one at least of the improvements for which the Act gives compensation is for domestic purposes—*i. e.*, works for the supply of water (*h*). And it is manifest that the tenant may, under this provision, claim to remove erections for which, had they been put up with the landlord's consent, he would have been entitled to compensation. It seems to follow, therefore, that the present section does give a right to remove some fixtures or buildings put up or erected for purposes other than those of agriculture. It must not, however, be assumed from this, that the Act applies to things put up for trade purposes; for as we have seen, with the special exception of market gardens, it does not apply to holdings which are not either wholly agricultural, or wholly pastoral, or in part agricultural and as to the residue pastoral (*i*). Purposes for which building or fixture put up.

(*g*) See Webster's Dict. *sub voc.*; *Allen v. Thompson*, L. R., 5 Q. B. 336, 339, per Blackburn, J.; and the argument in *Orgill v. Smith*, 6 M. & S. 182. In *Syme v. Harvey* (24 D. at p. 211), the Lord President refers to

green-houses, &c., as the "machinery" for carrying on the trade of a nurseryman.

(*h*) *Ante*, p. 83.

(*i*) *Ante*, p. 80. As to mixed cases of trade and agriculture, see *post*, p. 97 *et seq.*

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Whether
common law
right of re-
moval ex-
cluded.

Moreover, although the section confers a right of removing fixtures *ejusdem generis* with engines, machinery, or fencing, it is thought that the right is to be limited to cases in which the tenant had no right of removal before the Act. In this view, the section will not deprive the tenant of any right of removing such things, which he would have apart from statute. Thus, as will be pointed out hereafter, it has been decided that a tenant may remove a pump bolted to the wall of a house, as coming within the class of fixtures removable on the ground of domestic convenience (*j*). Construing the section, therefore, with a view to the removal of the grievance which it would seem it was the object of the Legislature to remedy—namely, the severity of the law with respect to *agricultural* fixtures as declared in *Elwes v. Maw* (*k*)—it is not to be supposed that in future the tenant of a holding to which the Act applies will not be allowed to remove such an article in cases where he has not brought himself within the provisos of the section now under consideration. This view is strengthened by the fact that, as has been stated, the Act contains a general saving of the tenant's other rights in respect of fixtures (*l*).

Property in
fixtures re-
movable
under Act.

The provision at the end of the enacting part of sect. 34, that the fixture or building *shall be the property of the tenant*, would seem to alter the common law rule (to which, as has been pointed out (*m*), the privilege of removal makes no exception), that a chattel by annexation to the soil becomes *the property* of the freeholder. As, however, that portion of the section is not absolute, but subject to several provisos, the result is that unless those provisos are complied with the tenant will forfeit the rights conferred (*n*). Thus, if a tenant attempt to remove a building or fixture

(*j*) *Grymes v. Boweren*, 6 Bing. 437; *post*, p. 114.

(*k*) *Ante*, p. 76.

(*l*) *Ante*, p. 82.

(*m*) *Ante*, p. 31.

(*n*) See Maxwell on Statutes (2nd ed.), pp. 452, 453; Wilberforce on Statute Law, pp. 300, 301.

without having given the landlord the previous notice required by this section, the latter will be entitled to interfere and prevent the removal. On the other hand, so long as only unavoidable damage—*i.e.*, damage which is inseparable from the act of removal—is committed by the tenant in removing an erection, the landlord will have no right to interfere, and his most efficient means of protecting his interests in such a case would seem to be to exercise his option of purchase (*o*). Chap. II. s. 2.

It will be noticed that the section in question expressly provides that the tenant may exercise the right of removal within a reasonable time after the determination of the tenancy, thereby obviating any doubts as to his right to do so, which might arise under sect. 3 of the Act of 1851, or which were possible under sect. 53 of the Act of 1875. Time of removal.

Perhaps the most important question which will arise on sect. 34 is whether it is competent to landlords and tenants to exclude its operation by contract. Upon reference to sect. 55 (*p*) it will be seen that the marginal note to that section in the Act is misleading, inasmuch as the section does not avoid all agreements inconsistent with the Act, but only such as purport to deprive the tenant of his right *to claim compensation*, and it invalidates the latter only in so far as they have that operation. There is no reference in this section to contracts relating to the totally different right conferred by sect. 34, *viz.*, the right of removing things for which the tenant is not entitled to compensation; and, therefore, there being no provision in the Act as regards the latter right, similar to that in sect. 55, it follows that there is nothing to prevent a tenant renouncing in whole or in part the benefits conferred upon him by sect. 34 (*q*). It is manifest, accordingly, that, if the view Contracts to exclude sect. 34 of Act.

(*o*) As to injury to the premises in cases not governed by statute, see *ante*, p. 69.

(*p*) *Ante*, p. 81.

(*q*) Sect. 33 expressly contemplates agreements, "*that this section shall not apply.*"

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here taken is correct, the result will be that as the Act gives no right to compensation in respect of improvements of the first class put up without the consent of the landlord, the tenant may in respect of that class of improvement be precluded not only from all right to compensation, but also from the right to remove the improvement, which sect. 34 would otherwise have given him.

**Procedure for
enforcing
rights.**

It remains only to consider shortly what is the procedure prescribed by the Act for enforcing the rights to compensation conferred by it. To entitle himself to compensation under the Act, the tenant *must*, two months at least before the determination of the tenancy, give notice in writing to the landlord of his intention to claim compensation. Thereupon, if the landlord intends to make a claim from the tenant in respect of any waste, or breach of covenant or other agreement, he *may*, at any time before the expiration of fourteen days after the determination of the tenancy, give a counter notice in writing of his intention to do so (*q*). It is important to observe on this that a tenant's failure to serve the notice (*r*) within the specified time will be fatal to his claim; whilst the landlord's failure to comply with the above provision, though it will probably necessitate an adjournment, will not, it is thought, be fatal to his claim for a reduction of the tenant's claim, in respect of any of the above matters. In the event of the landlord and tenant not agreeing as to the amount and mode of payment of compensation, the difference is to be settled by a reference to a referee, or to two referees and an umpire, in the manner prescribed by the Act (*s*). The award is not to be questioned otherwise than as provided by the Act, and if the sum claimed for compensation does not

(*q*) Sect. 7.

(*r*) Sect. 28. It will be noticed that the provisions of sect. 6, as to taking into ac-

count matters in reduction of the tenant's claim, are imperative.

(*s*) Sects. 8—21.

exceed 100*l*. the award is final (*t*). If, however, the sum claimed exceeds that amount, either party may within seven days after delivery of the award appeal against it to the County Court, on the ground (1) that the award is invalid; (2) That the award proceeds wholly or in part upon an improper application of or omission properly to apply the special provisions of sections 3, 4, or 5 of the Act; or (3) that compensation has been improperly awarded to the other party; or (4) that compensation to which the party appealing is entitled has been improperly withheld; or upon all or any of such grounds. The County Court judge may, if he think fit, remit the case for rehearing with directions (*u*). The decision of the County Court is final, save that the judge is, at the request of either party, to state a special case on a question of law for the opinion of the High Court, from whose decision there is no appeal (*u*). Money payable for compensation, costs or otherwise, is recoverable upon order made by the judge of the County Court, as money ordered by a County Court under its ordinary jurisdiction to be paid is recoverable (*v*). Chap. II. s. 2.

Such are the principal provisions, as regards improvements and fixtures, of the Agricultural Holdings (England) Act, 1883, as to the operation of which it would be hazardous to express an opinion; though it may possibly be found that the effect of the partial interference with the free right of contract between landlord and tenant may

(*t*) Sect. 22. As to a landlord's right to obtain a charge on the holding in respect of payment by him of tenant's compensation, or of his expenditure in executing drainage, see sects. 29—31.

(*u*) Sect. 23.

(*v*) Sect. 24. There are no provisions in the Act for the payment to the landlord of

any sum claimed by him which overtops the tenant's claim. The only section in the Act of 1875 (sect. 46) in which express mention was made of compensation paid to the landlord, was that relating to lands belonging to the Duchy of Lancaster. This portion of the section has been omitted in the present Act.

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not be so completely to the advantage of the latter as has been anticipated in some quarters.

General observations as to present right of removing fixtures or buildings.

Perhaps the present position of an agricultural tenant with respect to the removal of buildings and fixtures, in the absence of contract regulating the right (*w*), may be shortly summarized as follows:—

(A.)—A tenant to whom the Act of 1883 applies may, subject to the provisions of sect. 34 of that Act, remove buildings, fencing and fixtures, coming within that section, for which he is not entitled to compensation, either by reason of their not having been put up with the consent of the landlord, or from any other cause (*x*).

(B.)—Any tenant of a farm or lands who has put up buildings, engines or machinery, either for agricultural purposes or for purposes of trade and agriculture, with the consent of the landlord, may, under the provisions of 14 & 15 Vict. c. 25, s. 3, remove the same, although he would have been entitled to compensation for them under the Act of 1883 (*y*).

(C.)—A tenant for one year, or for less than a year, or at will, or a tenant occupying only during his continuance in the landlord's employment, may remove buildings, engines or machinery, under the provisions of 14 & 15 Vict. c. 25, s. 3 (*z*).

(D.)—In other cases of buildings or fixtures put up for agricultural purposes the rule declared in *Elwes v. Maw* applies, and there is no right of removal (*a*).

(*w*) See the remarks, *ante*, p. 93; and *post*, p. 145 *et seq.*

(*x*) *Ante*, p. 88.

(*y*) *Ante*, p. 77. The landlord would, of course, have the right of purchase given by that section.

(*z*) *Ante*, pp. 77, 81. But if the fixtures have been affixed before January 1st, 1884, to

a holding to which the Agricultural Holdings Act, 1875, applies, they may be removable under sect. 53 of that Act, notwithstanding its repeal. See 46 & 47 Vict. c. 61, s. 62.

(*a*) *Ante*, p. 76. For a summary of rules relating to fixtures between landlord and tenant, see Appendix (B).

SECTION III.

Of the Right of a Tenant to remove Fixtures set up for the Purpose of Trade combined with other Objects.

It was an observation made by Lord Ellenborough, in the case of *Elwes v. Maw* (a), that the exception which prevailed in favour of buildings erected for the purpose of trade establishes the existence of the general rule with respect to erections made for any other object. He, however, recognizes the validity of several decisions, in which instruments or utensils that have been set up in relation to trade in part, and in some measure for a purpose unconnected with trade, have been held removable. Chap. II. s. 3.

The decisions alluded to, are those of Lord Hardwicke respecting the fire-engines or steam-engines in collieries (b); and the case before Comyns, C. B., respecting the cider-mill (c). In the working of a colliery, the enjoyment of the profits of land is materially concerned; nevertheless, Lord Hardwicke considered that the getting and vending the coals so far partook of the nature of a trade, that the engines employed in the collieries might be deemed trading erections. The case of the cider-mill appears to rest on the same principle. For it was said, that although the mill was put up in part for the enjoyment of the real estate, yet as the making of cider was a species of trade, the mill might be considered to fall within the general exception in favour of trade fixtures (d). These decisions, Fixtures, where trade and the profits of land are combined.

(a) 3 East, 38, 57, *ante*, *Warde*, Amb. 113.
 p. 75. (c) 3 Atk. at p. 14.
 (b) *Lawton v. Lawton*, 3 Atk. (d) As to this case see *ante*,
 13; *Lord Dudley v. Lord* p. 57, and *post*, pp. 217, 229.

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therefore, in conjunction with the case of *Lawton v. Salmon* (e), in which Lord Mansfield expressed an opinion that the salt pans, though accessory to the land, would have been removable between landlord and tenant for the benefit of trade, point out a class of trade fixtures of a peculiar description. They are what Lord Hardwicke calls *mixed* cases, between enjoying the profits of land, and carrying on a species of trade (f); and in this respect they are distinguishable from those fixtures that are subservient to trades which have no relation to the profits of the demised land.

It appears necessary to consider these fixtures as a separate class, chiefly on account of the distinction taken in the case of *Elwes v. Maw*, as explained in the preceding section. For, in deciding whether such erections are removable or not, it is essential, with reference to the doctrine laid down in that case, to inquire into the proportion in which the profits of land are combined with the object of trade (g).

In what cases such fixtures are removable, apart from statute.

Apart from the statutory provisions as to agricultural tenants hereafter noticed (h), questions between landlord and tenant, respecting the right to fixtures of this description, must, even at the present day, principally be determined by the rules which Lord Hardwicke has laid down in *Lawton v. Lawton*, and *Lord Dudley v. Lord Warde* (i).

(e) 1 H. Bl. 260, *in notis*; see *post*, p. 221.

(f) *Lawton v. Lawton*, 3 Atk. at p. 16.

(g) Where the subject-matter of the tenant's occupation is not obtained from the demised land, but is brought from a distance, in order to be worked up for market, the case is not to be considered as referable to the

present section. Such was the instance of the lime-burner in *Thresher v. East London Waterworks Co.*, 2 B. & C. 608.

(h) 14 & 15 Vict. c. 25, s. 3; see *post*, p. 100.

(i) See the explanation given of these cases by Lord Ellenborough, C. J., in 3 East, 54. With which compare the judgments, as cited *post*, p. 167 *et seq.*

And it may be observed in general, that whenever the consideration of trade prevails to the same extent as it appears to have done in these cases, an erection may be treated as lawfully removable by a tenant. Chap. II. s. 3.

It may be useful in this place to point out in what manner the principles of the foregoing cases may be found applicable to questions in practice. Many examples might be suggested of fixtures similar to those already referred to, in which the enjoyment of the profits of land may be combined with trade. As, for instance, where machines and erections are made, and used by a tenant for procuring or preparing minerals, lime, alum, pottery and brick earth, &c. In like manner mixed cases may occur wherein agriculture is combined with a species of trade. For a tenant may cultivate land, and raise grain for the purpose of converting it into malt in his own kilns for sale; or he may grow corn and grind it into flour for sale in his occupation as a miller. Another tenant, following the trade of a butcher, may erect a beast-house and a fold-yard (j) for the use of cattle which he grazes upon the premises, or fattens on the produce of the land demised. So a distiller may grow his own grain; a weaver of linen his own flax. These, and the like instances, might give rise to many questions between landlord and tenant, which would involve the points above considered. Examples of fixtures of a mixed nature.

Another description of cases might be suggested, differing in some respects from the preceding. And that is, where a machine or utensil is employed sometimes for the purpose of trade, and at other times for a purpose wholly unconnected with trade; and where it may be uncertain whether the object of the erection is the trade to which a right of removal attaches, or the other employment to Fl.
occ
for

(j) In *Elwes v. Maw*, 3 East, 38, these erections were held exclusively for agriculture. See *ante*, p. 73 *et seq.*
not removable when put up

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which such a right does not attach. There is no express decision affecting cases of this description; but it is conceived that the question, whether an article would be removable under these circumstances, will mainly depend on the fact, to which of the two purposes the erection in dispute is more usually appropriated.

Primary object of erection must be considered.

In all questions relating to the several kinds of fixtures here described, and not falling within the statutory provisions hereinafter mentioned, it will be very important to consider what has been the primary object of the erection in dispute; and whether in making it the intention of trade predominated over the other purpose with which it is combined. With this view it may frequently be found useful to consult the decisions which have occurred in questions of bankruptcy; where the fact to be determined was whether the dealing of a person was in the way of merchandise, which was to be deemed his principal occupation, or was merely incidental to a pursuit not within the scope of the bankruptcy laws (*k*). We have already seen, however, that 14 & 15 Vict. c. 25, s. 3, has expressly provided that a tenant may remove buildings, engines or machinery, put up for purposes of trade and agriculture, if they have been put up with the consent of the landlord (*l*). In cases, therefore, falling within the provisions of this Act it will be immaterial whether the purpose of trade or that of agriculture was predominant.

Except in cases under 14 & 15 Vict. c. 25, s. 3.

Nurserymen, their rights.

There is another class of persons whose rights appear to depend on the principles discussed in this section; viz., the tenants of nursery gardens and grounds. It has been thought expedient to reserve their claims for a separate consideration in this place.

(*k*) The cases on the subject will be found collected in Robson on Bankruptcy (4th ed.),

pp. 107, 113.

(*l*) *Ante*, p. 77, and see the remarks *ante*, p. 91.

It is now clearly settled that *nurserymen* are entitled to sell and remove *trees, shrubs*, and the other produce of their grounds, planted by them with an express view to sale; and this on the ground of their carrying on a species of trade (*m*). And it has been held that fruit trees, although they were in full bearing, yet, if planted by a nurseryman in the way of his trade, might be removed by him at the expiration of his term; provided they might fairly be considered as nursery trees, and were not of larger growth than could be dealt with by him in his trade as a nurseryman (*n*).

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May remove trees, shrubs;

and fruit trees.

It was ruled, however, at *Nisi Prius*, by Lord Ellenborough, that a tenant of garden-ground could not plough up strawberry-beds in full bearing at the conclusion of his term, although he had purchased them of a preceding tenant, and although it was proved to be the general practice to appraise and pay for these plants as between outgoing and incoming tenants (*o*). In this case, however, it was considered, that the ploughing up of the plants was an injury maliciously done to the reversion; because the plants were not removed by the tenant for sale in his ordinary occupation, but were destroyed without any reasonable object (*p*).

Strawberry-beds.

It will be remembered that the Legislature has now expressly extended to market gardeners the benefits conferred on agricultural tenants by the Agricultural Holdings (England) Act, 1883, the provisions of which have been considered in the previous section (*q*). Therefore, under

Market gardeners.

(*m*) *Penton v. Robart*, 2 East, at p. 90; *Lee v. Risdon*, 7 Taunt. at p. 191; and see per Lawrence, J., in *Elwes v. Maw*, 3 East, at p. 45, *in notis*; and per Heath, J., in *Wyndham v. Way*, 4 Taunt. 316; also per Blackburn, J., in *Oakley v. Monck*, L. R., 1 Ex. at p. 167.

(*n*) *Wardell v. Usher*, 3 Scott, N. R. 508.

(*o*) *Watherell v. Howells*, 1 Camp. 227.

(*p*) See per Blackburn, J., in *Oakley v. Monck*, *supra*.

(*q*) 46 & 47 Vict. c. 61, s. 54, *ante*, p. 80.

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that Act, such persons may be entitled to compensation for the erection or enlargement of buildings, the making of gardens, and the planting of orchards or fruit bushes, &c., although they cannot *under its provisions* claim to remove things growing in the soil.

Other persons
may not re-
move trees;

nor box-edg-
ing; nor
flowers.

But where a mere private individual, or a person who occupies land as a farmer, and does not profess to be a nurseryman or gardener, raises young fruit trees on the demised land, for the purpose of planting in his gardens or orchards, he is not entitled to sell or remove them at the end of his term (*r*). Such a person therefore will not be allowed to remove vines in a vinery (*s*). And so it has been held that a tenant, not being a gardener, is not at liberty to take away a border or edging of box planted by himself (*t*); nor even flowers (*u*). But a tenant to whom the Agricultural Holdings Act, 1883, applies may claim compensation in respect of the improvements specified in Part I. of the First Schedule to that Act (*v*).

Hot-houses,
or green-
houses.

With respect to the right of nurserymen and gardeners to remove hot-houses, greenhouses and other similar erec-

(*r*) Per Heath, J., in *Wyndham v. Way*, *supra*, and per Lord Deas, in *Syme v. Harvey*, 24 D. at p. 214. That it is waste in a tenant to destroy fruit-trees, see Com. Dig. tit. Wast (D. 3.). A tenant has the property in hedges and bushes cut on the premises; but if he grubs up or destroys them, he is liable to an action for waste, *Berriman v. Peacock*, 9 Bing. 384. It is not waste in a lessee for years to cut down willows, leaving the stools or butts from which they will shoot afresh; unless where they are a shelter to a house, or a support to the

bank of a stream, *Phillipps v. Smith*, 14 M. & W. 589; and see *Dunn v. Bryan*, Ir. R., 7 Eq. 143. As to pollards, see *Channon v. Patch*, 5 B. & C. 897, *post*, p. 368, note (*i*). With respect to cases where bushes, &c., are excepted in the demise, see *Jenney v. Brook*, 13 L. J., Q. B. 376.

(*s*) *Jenkins v. Gething*, 2 J. & H. at p. 525.

(*t*) *Empson v. Soden*, 4 B. & Ad. 655.

(*u*) S. C. per Littledale, J., at p. 657; as to turf and gravel, see *Burns v. Fleming*, 8 R. 226.

(*v*) *Ante*, p. 83.

tions put up at their own expense, it was expressly said by Lord Kenyon, in the case of *Penton v. Robart* (*w*), that they might take away such things at the end of their term. Lord Kenyon's opinion upon this subject, however, was subsequently disapproved by Lord Ellenborough (*x*). It has been held that a tenant has no right to remove such erections where they are put up merely for purposes of ornament and convenience (*y*); but there seems to be no reason why if put up for purposes of trade they should not be removed as well as trees in a nursery ground. There is no reported decision on this point in England, but the question arose in Scotland in 1861 in the case of *Syme v. Harvey* (*z*), where the tenants, who were nurserymen, claimed to remove a greenhouse, propagating house and some hotbed frames erected by them. The erections were composed partly of brickwork and partly of glass and framework, and their foundations were sunk into the ground to some depth. The framework rested on, but was not fastened to, wall-plates attached to the brickwork by mortar, and it was easily removable without disturbing the brickwork (*a*). It was held that, looking at the character of the structures and the purpose for which they were erected—viz., the carrying on of the tenants' trade—the tenants were entitled to remove those portions of the erections which consisted of framework. The tenants consented to leave the brickwork if the landlord so desired, and, therefore, no decision was given as to their right to

Chap. II. s. 3.

*Syme v.
Harvey.*

(*w*) 2 East, at p. 90.

(*x*) *Elwes v. Maw*, 3 East, at p. 56. And see the observations of Dallas, C. J., in *Buckland v. Butterfield*, 2 Brod. & Bing. at p. 58. In this latter case, as reported in 4 Moore (C. P.) 440, a MS. case is cited by Blosset, Serj., in which it is said to have been determined, that glasses and frames resting on brick-

work in a nursery-ground were not removable.

(*y*) *Jenkins v. Gething*, 2 J. & H. 520; see *post*, p. 113.

(*z*) 24 D. 202.

(*a*) It seems to have been assumed throughout the case that the framework was a fixture. From the description, however, it would almost appear that there was a want of annexation. See *ante*, p. 2.

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remove this portion of the structures, although two of the learned judges intimated a doubt whether they would have been prepared to negative the tenants' rights even in this respect. Upon this latter point the reader is referred to the remarks upon the subject of accessory buildings in section 1 of this chapter (b).

With reference to the class of cases treated of in this section, the following remarks of the Lord President in the above case of *Syme v. Harvey* (c) may be found useful:—"As new branches of trade arise, new uses of land arise, and as heritable subjects" (*i. e.*, real property) "may become part of the property of a trading company, they may be applied to uses intended for purposes of a more or less permanent character. The law in respect to questions arising out of such occupation must accordingly adapt itself in virtue of the expansive power it possesses to the changes that take place in the course of time" (d).

(b) *Ante*, p. 63. As to the removal of buildings by agricultural tenants and market gardeners under the Agricultural Holdings Act, 1883, see *ante*, p. 88 *et seq.*

(c) 24 D. at p. 210.

(d) For a summary of rules relating to fixtures between landlord and tenant, see Appendix (B.).

SECTION IV.

Of the Right of a Tenant to remove Fixtures put up for Ornament or Convenience.

THERE is another class of fixtures mentioned in several of the decisions, of a very different description from those treated of in the preceding sections. It consists of things which a tenant has affixed to the demised premises for the purpose of ornament or convenience.

Chap. II. s. 4.
Fixtures for ornament, &c. removable.

In some of the earliest cases it was said, that a lessee might take away tables dormant, furnaces, and the like (a); and from the manner in which these instances are mentioned by the Courts, it may be inferred that they were not meant to denote trade erections, but were put as mere general examples of fixtures. It has been seen on a former occasion, that this remark applies equally to the passage in the Year Book, 21 Hen. 7, p. 26 (b). There is, however, much obscurity in the early decisions; and the distinctions upon which many of them proceed would not be deemed tenable at the present day.

Ancient authorities.

Lord Coke, in treating of the liability of the tenant on account of waste, lays down the rule in favour of the reversioner in unqualified terms. He says, "If glasse windowes (tho' glazed by the tenant himselfe) be broken downe, or carried away, it is wast, for the glasse is part of his house. And so it is of wainscot, benches, doores, windowes, furnaces, and the like, annexed or affixed to

(a) *Vide* Yr. Bks. 8 Hen. 7, p. 12, 20 Hen. 7, p. 13;] Br. Ab. tit. Chattels, pl. 7, 11; *Id.* tit. Waste, pl. 104. See also *Day v. Austin*, Owen, 70; S. C. Cro. Eliz. 374. (b) *Ante*, p. 47.

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“the house, either by him in the reversion, or the tenant” (c). And the remarks at the end of *Herlakenden’s* case are to the same effect (d).

*Squier v.
Mayer.*

When, at a subsequent period, Lord Holt declared his opinion in *Poole’s case* (e), that a tenant was allowed to take away erections put up in relation to trade, he expressly denied his right to remove annexations made for other purposes. For he said, that there was a difference between what the soap-boiler did to carry on his trade, and what he did to complete his house, as hearth and chimney-pieces, which he held not removable. And yet there had been a decision in Chancery almost immediately before Lord Holt expressed this opinion, in which the strictness of the old rule of law had been departed from, in a case in which the consideration of trade was not involved, and in circumstances where the rule is supposed to be even more rigid than between landlord and tenant. For in the case of *Squier v. Mayer* (f), it was held by the Lord Keeper, that a furnace, though fixed to the freehold, and purchased with the house, and also hangings nailed to the walls, should be accounted as personalty, and should go to the executor of the deceased owner of an estate as against the heir. Contrary, as the report says, to *Herlakenden’s* case, “*q’il dit n’est ley quoad præmissa.*”

Furnaces
removable.

This case was indeed decided between the executor and the heir of the deceased owner of the inheritance. But it may, nevertheless, be regarded as an authority in favour of a tenant. Because, according to the rule laid down in a former part of this chapter (g), a tenant is entitled to at

(c) 2 Co. Lit. 53 a.

(d) 4 Co. 64 a. And see Swinb. Wills, pt. 3, § 6, and pt. 6, § 7; Noy, Max. 167; Vin. Ab. tit. Waste (F.); Com. Dig. tit. Wast (D. 2). See also Yr. Bk. 10 Hen. 7, p. 2.

(e) 1 Salk. 368 [Mich. 2 Ann.]

(f) Trin. T. 1701. Freem. Cas. Chy. p. 249; S. C. 2 Eq. Cas. Ab. 430.

(g) See *ante*, p. 50.

least the same privilege against his landlord that an executor enjoys against the heir. Agreeably, therefore, to the decision in *Squier v. Mayer*, furnaces and hangings are matters which a tenant may remove, if he himself affixed them to the demised premises. Chap. II. s. 4.

In another case in Chancery, *Beck v. Rebow* (*h*), which occurred shortly after *Poole's case*, the right of a tenant to take away articles in no way connected with trade was expressly recognized by the Court. In this case a bill was filed for the specific performance of certain articles of agreement against the defendant, who was the executor of the covenantor, and also devisee in trust of a messuage. The testator had covenanted to grant to the plaintiff all the pictures upon the staircase and over the doors and chimney pieces, and all things fixed to the freehold of the messuage. After the testator's death, the defendant took away such pictures, and likewise the pier-glasses, hangings, and chimney-glasses. It was alleged for the plaintiff, that all these were as wainscot, and fixed to the freehold, being fastened thereto with nails and screws, and no wainscot under them; and as they would have gone to the heir and not to the executor, so *à fortiori* would they go to the plaintiff; and especially the covenant being to grant to plaintiff all things fixed to the freehold. In support of this doctrine the case of *Care v. Care* (*i*) was cited. But the Lord Keeper, as to all but the pictures over the doors, chimney-pieces, and on the staircase, was of a different opinion; saying, "that *hangings and looking-glasses* were only matter of ornament and furniture, and "not to be taken as part of the house or freehold, but "removeable by the lessee of the house" (*j*).

Hangings,
pictures,
pier-glasses,
chimney-
glasses, &c.

(*h*) 1 P. Wms. 94. [Hil. T. 1706.]

(*i*) 2 Vern. 508.

(*j*) As to when mirrors, pictures, &c., are mere chattels, see *ante*, p. 8.

Part I.

Tapestry,
iron backs to
chimneys.

After an interval of some years, a case was adjudged at common law, where in trover by an executor against the heir Lee, C. J., held that hangings, tapestry, and iron backs to chimneys belonged to the executor and not to the heir (*k*). And, as in the before-mentioned case of *Squier v. Mayer* so in this, the inference from the determination is, that articles of this description would be removable by a tenant against his landlord.

Wainscot,
marble chim-
ney-pieces,
fixed beds.

The opinions of the judges in several decisions of later date are in conformity with the foregoing cases. Lord Hardwicke, in one part of his judgment in *Laulton v. Laulton* (*l*), observes, “what would have been held to be “waste in Henry the Seventh’s time, as removing wainscot “fixed only by screws, and marble chimney-pieces, is now “allowed to be done” (*m*). And in *Ex parte Quincy* (*n*), he says, “During the term a tenant may take away chimney- “pieces and even wainscot.”—“Several sorts of things are “often fixed to the freehold, and yet may be taken away, “as beds fastened to the cieling with ropes (*o*); nay fre- “quently nailed, and yet, no doubt but they may be re- “moved.” Indeed, Lord Hardwicke seems to have been of opinion, that the exceptions engrafted upon the old rule of law, obtained not merely in respect of trade fixtures, but in respect of erections made for the general improvement of the estate. So in *Laulton v. Salmon* (*p*), Lord Mansfield said, “Many things may now be taken away which “could not be formerly, such as erections for carrying on

(*k*) *Harvey v. Harvey*, 2 Str. 1141. [*temp.* 14 Geo. 2.]

(*l*) 3 Atk. at p. 15.

(*m*) And see *Grymes v. Boweren*, 6 Bing. at p. 439, per Tindal, C. J. As to the extent of the privilege with regard to wainscot and chimney pieces, see *post*, p. 119 *et seq.*

(*n*) 1 Atk. 477. So in *Lord Dudley v. Lord Warde*, Amb. 113.

(*o*) As to these, see Yr. Bk. 20 Hen. 7, p. 13; Keilw. 88; Noy, Max. 167.

(*p*) 1 H. Bl. 260, *in notis.* And see per Patteson, J., in *Leach v. Thomas*, 7 C. & P. 327.

“ any trade, marble chimney-pieces, and the like, when put up by the tenant.” And Lord Ellenborough, in *Elwes v. Maw* (q), cites several of the above authorities; and considers that they have established a distinct class of cases, in extension of the privilege before enjoyed by the tenant in respect of trade fixtures. He says, “ The indulgence in favour of the tenant for years during the term, has been since carried still further; and he has been allowed to carry away matters of ornament, as ornamental marble chimney-pieces, pier-glasses, hangings, wainscot fixed only by screws, and the like” (r). In the case of *Leach v. Thomas* (s), it was expressly ruled by Patteson, J., that if a tenant puts up chimney-pieces of an ornamental nature, he has a right to remove them.

Although marble chimney-pieces are expressly mentioned in several of these cases, yet it may be safely assumed that the privilege extends to ornamental chimney-pieces of other materials; for it would be unreasonable to suppose that a chimney-piece of the plainest workmanship, and most moderate expense, might be removed merely because it was of polished limestone, and therefore denominated marble, and that one of granite, freestone or wood, however skilfully carved, might not (t).

Again, in *Lee v. Risdon* (u), Gibbs, C. J., mentions “ wainscots screwed to the wall, . . . certain grates, and the like,” as fixtures which a tenant may sever during his term. And in a more modern case (v), it was said by Lord Cranworth, C., in delivering the judgment of the

(q) 3 East, at p. 53.

(r) And see *Gibson v. Hamersmith Rail. Co.*, 32 L. J., Ch. at p. 341, per Kindersley, V.-C.

(s) 7 C. & P. 327.

(t) *Bishop v. Elliott*, 24 L. J., Ex. at p. 232.

(u) 7 Taunt. at p. 191. And see Bul. N. P. 34; *Greene v. Cole*, 2 Wms. Saund. at p. 259 a; Harg. Co. Lit. 53 a, n. 5.

(v) *Ex parte Barclay, In re Gawan*, 5 D., M. & G. at p. 410.

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Court: "I wish to state that by fixtures we, for the Lords Justices and myself take the same view of the case, understand such things as are ordinarily affixed to the freehold for the convenience of the occupier, and which may be removed without material injury to the freehold; such will be machinery, using a generic term, and, in houses, grates, cupboards, and other like things" (*w*).

Conservatories,
pineries.

The case of *Buckland v. Butterfield* (*x*) must next be mentioned; and it deserves particular notice, because whilst it expressly recognizes the principle upon which the decisions depend, it limits and defines the extent of the privilege they have introduced in favour of tenants. It will therefore be proper to state it at some length. It was an action on the case in the nature of waste, by a tenant for life, against the assignees of her lessee from year to year, who had become bankrupt. The case was tried before Graham, B., and it was proved that the defendants had taken away from the premises let to the bankrupt a conservatory and a pinery. The conservatory, which had been purchased by the bankrupt, and brought from a distance, was by him erected on a brick foundation fifteen inches deep; upon that was bedded a sill, over

(*w*) In *Colegrave v. Dias Santos*, 2 B. & C. 76, Abbott, C. J., thought that certain stoves, cooling coppers, mash tubs, water tubs, and blinds (which it must be presumed from the nature of the dispute were in some way annexed to the freehold) were removable as between landlord and tenant. So of stoves and grates fixed into the chimney-places with brickwork, *R. v. St. Dunstan's*, 4 B. & C. 686, 691, per Bayley, J.; *Grymes v. Bowceren*, 6 Bing. at p. 439,

per Tindal, C. J.; *Elliott v. Bishop*, 24 L. J., Ex. at pp. 39, 42, per Platt, B.; *R. v. Lee*, L. R., 1 Q. B. at p. 254, per Blackburn, J. So of a cupboard supported by holdfasts and standing on the ground, *R. v. St. Dunstan's* (*supra*); *Boyd v. Shorrocks*, L. R., 5 Eq. at p. 79, per Wood, V.-C. So of bells, pulls, cranks, wires, &c., *Lyde v. Russell*, 1 B. & Ad. 394; *Pugh v. Arton*, L. R., 8 Eq. at p. 629.

(*x*) 2 Brod. & Bing. 54.

which was frame-work covered with slate ; the frame-work was eight or nine feet high at the end, and about two in front. This conservatory was attached to the dwelling-house by eight cantilivers let nine inches into the wall, which cantilivers supported the rafters of the conservatory. Resting on the cantilivers was a balcony with iron rails. The conservatory was constructed with sliding glasses, and was paved with Portland stone, and connected with the parlour chimney by a flue. Two windows were opened from the dwelling-house into the conservatory, one out of the dining-room, another out of the library. A folding-door was also opened into the balcony ; so that when the conservatory was pulled down, that side of the house to which it had been attached became exposed to the weather. The pinery was erected in the garden, on a brick wall four feet high (y). Surveyors who were called stated that the house was worth 50% a-year less after the conservatory and pinery had been removed. The learned judge stated his opinion, that the plaintiff ought to recover at least for the pinery, and probably for the conservatory, and the jury gave a verdict for the plaintiff.

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Buckland v.
Butterfield.

Subsequently, a rule *nisi* was obtained for a new trial, on the ground that the conservatory (z), though affixed to the freehold, was a matter of ornament, not beneficial to the premises, but lawfully removable by the tenant. After argument, the Court of Common Pleas took time to consider ; and the judgment was delivered by Dallas, C.J., who said, “ The question in the cause, as far as relates to “ the motion now before us, was whether a conservatory. “ affixed to the house in the manner specified in the “ report, was so affixed as to be an annexation to the free- “ hold and to make the removal of it waste.

Judgment of
C. P.

(y) This appears from the report of the case in 4 Moore (C. P.), 440.

(z) The rule *nisi* did not extend to the pinery.

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Judgment of
C. P. in
*Buckland v.
Butterfield.*

“ Nothing will, here, depend on the relation in which the
 “ parties stood to each other, or the distinction between
 “ trade and agriculture ; for this is merely the case of an
 “ ornamental building constructed by the party for his
 “ pleasure, and the question of annexation arises on the
 “ facts reported to us ; and I say the facts reported,
 “ because every case of this sort must depend on its
 “ special and peculiar circumstances. On the one hand,
 “ it is clear, that many things of an ornamental
 “ nature may be in a degree affixed, and yet, during
 “ the term may be removed ; and on the other hand
 “ it is equally clear, that there may be that sort of fixing
 “ or annexation, which, though the building or thing
 “ annexed may have been merely for ornament, will yet
 “ make the removal of it waste. The general rule is, that
 “ where a lessee, having annexed a personal chattel to the
 “ freehold during his term, afterwards takes it away, it
 “ is waste.—In the progress of time this rule has been
 “ relaxed, and many exceptions have been grafted upon
 “ it. One has been in favour of matters of ornament, as
 “ ornamental chimney-pieces, pier-glasses, hangings, wain-
 “ scot fixed only by screws, and the like. Of all these it
 “ is to be observed, that they are exceptions only, and
 “ therefore though to be fairly considered, not to be ex-
 “ tended ; and with respect to one subject in particular,
 “ namely, wainscots, Lord Hardwicke treats it as a very
 “ strong case. . . . Allowing, then, that matters of orna-
 “ ment may or may not be removable, and that whether
 “ they are so or not must depend on the particular case,
 “ we are of opinion that no case has extended the right to
 “ remove nearly so far as it would be extended if such
 “ right were to be established in the present instance under
 “ the facts of the report, to which it will be sufficient to
 “ refer ; and, therefore, we agree with the learned Judge
 “ in thinking, that the building in question must be con-
 “ sidered as annexed to the freehold, and the removal of it
 “ consequently waste.”

This case was followed in 1862 by a case in Chancery, before Wood, V.-C. (*a*), the erections in dispute being substantially of the same kind. There was, however, the material distinction that they were not in any way affixed to the house, but stood apart in the garden, and, therefore, their removal would not have caused the same injury as in the above case, where the house became exposed to the weather. It was held, that there was nothing to distinguish the case from *Buckland v. Butterfield*, and, therefore, that the erections in question were not removable by the tenant. The Vice-Chancellor said, "*Primâ facie* this case appears to be rather stronger in favour of treating the buildings as fixtures (*b*), than that of the conservatory in *Buckland v. Butterfield*, as there might be a question there as to whether the conservatory was not an ornamental adjunct of the house; whereas these buildings are affixed not to the house, but to the garden." The fact, therefore, that the erections could not be said to be ornamental adjuncts of the house seems, in the opinion of the Vice-Chancellor, to have been conclusive against their removal.

Chap. II. s. 4.

Jenkins v. Gething.

Among the articles in question in this case were a boiler built into the floor of a greenhouse, and a system of heating-pipes connected with it by screws. The boiler was held not to be removable; as to the pipes, however, the decision was otherwise, on the ground that although they were used as a means of circulating the water from the boiler, still they were connected merely by screws, and might very naturally and easily be removed from time to

Boiler and heating-pipes in hot-house.

(*a*) *Jenkins v. Gething*, 2 J. & H. 520, and see *post*, p. 117; followed in *Gardiner v. Parker*, Upper Canada Rep. 18 Ch. 26. Compare *Syme v. Harvey*, 24 D. 202, *ante*, p. 103.

(*b*) This term must have been used here as denoting articles which have been annexed to land and cannot legally be removed; see *ante*, p. 1.

Part I. time like gas fittings (*c*), and that they could hardly be treated as a mere adjunct of the boiler.

Pumps.

A few years after the decision in *Buckland v. Butterfield*, followed the case of *Grymes v. Boweren*, also in the Common Pleas (*d*). In that case a tenant from year to year had during the term erected a pump at his own expense, on the demised premises. The tube of the pump passed through the brick flooring into a well beneath, which had originally been open, but which the tenant had arched over when he erected the pump. The pump was attached to a stout upright plank, which rested on the ground at one end, and was fixed to the wall by an iron bolt or pin with a nut and screw on the other side. In withdrawing the tube, four or five of the floor bricks were displaced, but the iron bolt was left as before in the wall. It was held that the pump fell within the class of removable fixtures, and might lawfully be taken away by the tenant. Tindal, C. J., said, "It is difficult to draw any very general and at the same time precise and accurate rule on this subject; for we must be guided in a great degree by the circumstances of each case, the nature of the article, and the mode in which it is affixed." His Lordship also remarked, that the circumstance that upon a change of occupiers, articles of this sort are usually allowed by landlords to be paid for by the incoming to the outgoing tenant, was confirmatory of the view taken by the Court.

Ornamental cornice.

Finally, reference may be made to the case of *Avery v. Cheslyn* (*e*); in which the question was, whether a wooden

(*c*) There seems to be no reported decision in which the right of a tenant of a house to remove gas fittings has been directly in question; but in practice the tenant's right in respect of these articles is never disputed. See per Platt, B., in *Elliott v. Bishop*, 24 L.

J., Ex. at pp. 39, 42; *id.* p. 229. That gas fittings are not chattels, see *ante*, p. 12, note (*r*).

(*d*) 6 Bing. 437. Compare *Chidley v. West Ham*, 32 L. T. 486; *ante*, pp. 16—18.

(*e*) 3 A. & E. 75.

cornice fixed to the room of a house by a tenant during his tenancy was removable by him or not? At the trial the learned Judge desired the jury to find in favour of the tenant, if they considered that the cornice was merely a matter of ornament, capable of removal without substantial injury to the freehold, and was in fact so removed during the tenancy. On motion for a new trial, on the ground of misdirection on these points, the Court considered that the direction was correct; and that the inquiry as to the fact of the removal being without injury, formed a proper test as to the way in which the cornice was fixed to the freehold.

Chap. II. s. 4.

The cases that have now been cited furnish the only instances in which questions have come before the Courts in respect of the particular class of fixtures treated of in this section. But, in order to complete the series of determinations, it may be proper to refer to the case of *Leach v. Thomas* (*f*), which has been already cited, and in which it is said to have been ruled by Patteson, J., at Nisi Prius, that where a tenant had built some small pillars of brick and mortar on a dairy floor to hold pans, he had no right to remove them, although the pillars were not let into the soil. The ground of this opinion is not stated in the report; but it may be noticed, that here the property in question could not be removed in an entire state, as in most of the other instances; but its removal would have occasioned the entire disintegration of the thing itself (*g*).

Brick pillars.

On examining the decisions which have here been collected, the reader will not fail to observe the stress which is laid in most of them upon the circumstance of the erection being put up for the purpose of ornament. In *Beck v. Rebow* (*h*) it is said, that hangings and looking-

Examination of decisions.

(*f*) 7 C. & P. 327, ante, p. 62.
p. 109.

(*h*) 1 P. Wms. 94, ante,

(*g*) See *Whitehead v. Bennett*, 27 L. J., Ch. 474, ante, p. 107.

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glasses are removable, because only matters of ornament and furniture (*i*). Lord Hardwicke and Lord Mansfield, both speak of marble chimney-pieces being removable (*k*). Lord Ellenborough still more pointedly says, that the tenant is allowed to remove matters of ornament, as ornamental marble chimney-pieces, pier-glasses, &c. (*l*). And Dallas, C. J., makes use of the same expressions, and states that the exception has been in favour of matters of ornament, as ornamental marble chimney-pieces, pier-glasses, and the like (*m*). The same observation applies to the more modern case of *Bishop v. Elliott* (*n*), in which the Court of Exchequer Chamber emphasized the ornamental nature of the article as the test of removability.

Principle of
the relaxa-
tion.

From the authorities, therefore, considered in this view, a rule has been deduced, that a tenant is entitled to take away certain things which he has at his own expense affixed to the demised premises for the purpose of ornament and furniture. And the principle on which this rule is founded appears to be, that as annexations of this nature must generally be designed for temporary purposes only, it would greatly incommode tenants in the enjoyment of their estates, if, by every slight attachment to the freehold, the reversioner should obtain the absolute property in the

(*i*) As to *hangings*, these are esteemed by Swinburne as mere chattels; for they are mentioned by him as being comprehended under the term household stuff, and passing under a general legacy of household stuff. Swinb. on Wills, pt. 7, § 10, p. 945 (7th ed.); and see *ante*, p. 7. Speaking of wainscot being parcel of the house, as between executor and heir, he notes in the margin, "*Quamvis jure civili, quæ ornatûs gratiâ magis quam perficiendi do-*

"mum ponuntur, ædium partes non sunt." *Id.* pt. 6, § 7, p. 759 (7th ed.) See also Godolph. Orph. Leg. pt. 2, ch. 14, p. 126 (3rd ed.)

(*k*) *Ante*, p. 108.

(*l*) *Ante*, p. 109.

(*m*) *Ante*, p. 112. And see *Leach v. Thomas*, 7 C. & P. 327; *Avery v. Cheslyn*, 3 A. & E. 75.

(*n*) 24 L. J., Ex. 229. And see *Gibson v. Hammersmith Rail. Co.*, 32 L. J., Ch. at p. 341.

article annexed. Hence it is obvious that the tenant's right of removal in respect of this class of annexations depends upon very different grounds from those which prevail in the case of fixtures put up for trade and manufactures. Chap. II. s. 4.

But on recurring to the facts of the cases which have been cited, it appears that some of the articles held to be removable by a tenant, are not matters of mere ornament and decoration. They consist rather of instruments and utensils affixed for purposes of general utility or common domestic convenience. It is notorious also in practice, that a great variety of articles are considered to belong to the tenant, and as such are taken away or valued to the incoming tenant, which cannot be said to have been put up with a view to ornament; neither are they in any manner connected with trade. Although, therefore, articles of this description are not strictly referable to the head of ornamental fixtures, yet it is now generally understood that they fall within the same principle, and may be removed by the tenant at the end of his term (*o*). Perhaps in these cases, the personal nature of the property is the principal ground upon which it is protected. For it is observable that the species of annexations, which have been held to be removable, are utensils and machines which are perfect chattels in themselves, and are, for the most part, such as serve as substitutes for mere moveable furniture; whilst the privilege has in no case been extended so far as to permit the removal of anything in the nature of a building or erection, though of a temporary character and easily moveable. This view would seem to be supported by the decision of Wood, V.-C., in the above-mentioned case of *Jenkins v. Gething* (*p*). The Vice-Chancellor there held that the greenhouse was not removable,

Fixtures not strictly ornamental.

(*o*) See *Grymes v. Boweren*, 6 Bing. at p. 440; *Bishop v. Elliott*, 24 L. J., Ex. at p. 37; *Ex parte Barclay, In re Gawan*, 5 D. M. & G. at p. 410; *Climie v. Wood*, L. R., 4 Ex. at p. 329; *Holland v. Hodgson*, L. R., 7 C. P. at p. 333.
(*p*) *Ante*, p. 113.

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because it could not be looked upon as an ornamental adjunct of the house; and he did not even refer to the question whether it was affixed for the purposes of the tenant's convenience. It must have been on the latter ground, however, that he held that the heating-pipes were removable (*q*).

Tenants'
rights under
Agricultural
Holdings Act,
1883.

But in considering a tenant's right of removing articles erected by him for domestic convenience, it may in the future be necessary, in some cases, to refer to the provisions of the Agricultural Holdings Act, 1883. For, as has been pointed out in a former page (*r*), the section of that Act which confers a right of removing buildings, and engines, machinery, fencing and other fixtures, makes no mention of the purposes for which such things may have been erected. It seems, therefore, that under that provision a tenant to whom the Act applies (*s*) may claim a right of removal in respect of domestic convenience more extensive than that to which he would have been entitled apart from the statute.

Extent of the
tenant's right
of removal.

Having now considered the general doctrine as to the removal of fixtures put up for ornament or convenience, it remains to inquire how far the exception in favour of this description of property may be extended; and to examine whether the tenant is subject to any greater restriction in the exercise of this privilege of removal, than he is in respect of the class of fixtures which have been treated of in the preceding sections. On referring to the cases with a view to this inquiry, it will be found, that although an article appears to be such that, its object alone considered, it would fall within the description of things that are removable as matters of ornament or convenience, there may, notwithstanding, be certain particulars connected

(*q*) See also the opinion of *terfield, ante*, p. 111.
Graham, B., as to the pinery (*r*) *Ante*, p. 91.
in the case of *Buckland v. But-* (*s*) *Ante*, p. 81.

withits erection, which will enti rely prevent the exercise of the tenant's right. For in the class of fixtures described in this section, the operation of a principle is found, which, in the trade cases, is hardly adverted to in any of the judicial decisions. And this relates to the mode of annexation of the article. Chap. II. s. 4.

In one of Lord Hardwicke's decisions (*t*), the right of removing the wainscot is stated with a qualification of its being fixed only with screws. In a subsequent case (*u*), Lord Hardwicke states its removability without this qualification; but he says it is a very strong case. In *Elwes v. Maw* (*x*), Lord Ellenborough, alluding to the same article, again introduces the mention of the screws; and this is repeated by Gibbs, C. J., in *Lee v. Risdon* (*y*), and again in the judgment of the Court in *Buckland v. Butterfield* (*z*). In the last-mentioned case, Dallas, C. J., says, "There " may be that sort of fixing or annexation which, though " the building or thing annexed may have been solely for " ornament, will yet make the removal of it waste;" and upon this ground, viz., that it was so annexed as to be permanently incorporated with the principal building, it was determined that the conservatory (the construction of which has been particularly described in a former page) could not be taken away. In like manner, in *Grymes v. Boweren* (*a*), Tindal, C. J., among other circumstances, relies on the fact that the article was only slightly attached to the freehold. Mode of annexation.

It must be admitted, that the removal of wainscot is a very strong case; that is, if the dictum of Lord Hard- Extent of privilege in respect of wainscot considered.

(*t*) *Lawton v. Lawton*, ante, p. 108.

(*u*) *Ex parte Quincy*, 1 Atk. 477.

(*x*) *Ante*, p. 109.

(*y*) *Ibid*.

(*z*) *Ante*, p. 112. See also *Jenkins v. Gething*, ante, p. 113; *Martin v. Roe*, 7 E. & B. at p. 249. And see Noy, Max. p. 167.

(*a*) 6 Bing. at p. 440, ante, p. 114.

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wicke is to be understood as referring to the ordinary wainscot of a house as now erected. Wainscot is one of the things which Lord Coke expressly points out as not removable by a tenant (*b*) ; and in *Day v. Bisbitch* (*c*), Anderson, C. J., lays down the same rule. In the earlier cases it was said, that a lessee could not take down partitions that he had fixed to the freehold (*d*). Lord Hardwicke does not state upon what authority he founded his opinion in respect of this article, but there probably may have been a decision on the subject which has not been reported. It would be important to know the time when such a decision took place, as it might be the means of ascertaining the particular description of wainscot which was held removable, by inquiring into the state of refinement in domestic economy at that particular period. For if it was only that kind of covering for walls described in *Beck v. Rebow* (*e*), and other cases, which consisted of pictures or tapestry, put up with hooks or screws in lieu of wainscot (as was the practice in former times), it is obvious that it would be no authority for the removal of the wainscot of a modern house. This was no doubt the kind of erection referred to by Doderidge, J., in *Bridgman's case* (*f*), where he says, that wainscot may as well be removed as arras hangings. In all questions of this sort, it is particularly necessary to consider the decisions with reference to the degree of improvement in modern manners, as compared with those of earlier times (*g*). In Henry the VII.'s time, it was said that glass should not be considered to belong to the heir as parcel of the house, because it was not necessary to the house, which was perfect without it. So in *Cooke's case* (24 Eliz.) (*h*), the Court took

(*b*) *Ante*, p. 105.

(*c*) Cro. Eliz. 374.

(*d*) Yr. Bk. 10 Hen. 7, p. 2;
Cooke's case, Moore, 177.

(*e*) *Ante*, p. 107.

(*f*) 1 Roll. 216.

(*g*) See the remarks of Platt, B., in *Elliott v. Bishop*, 24 L. J., Ex. at p. 40 ; and see *S. C.* in Exch. Ch., *id.* pp. 230 (per Maule, J., in argument) and 232.

(*h*) *Supra*.

a difference between removing outer-doors and inner-doors, saying, that the latter might be removable as being less necessary to the house. In *Grymes v. Bouveren* (i), both Tindal, C. J., and Park, J., appear to recognize the removal of wainscot as sanctioned by the authorities. But if on any future occasion a question should directly arise as to the right of taking down wainscot, it is highly probable that the Court would not be disposed to favour a removal, which would so materially injure and disfigure the dwelling-house, and at the same time produce so little benefit to the tenant.

Chap. II. s. 4.

Quere, whether it would now be held removable.

The instance put of chimney-pieces is scarcely less strong than that of wainscot. Lord Hardwicke first introduced the mention of them (k); but he does not state under what circumstances their removal would be justifiable. And although his opinion in respect of this article has been followed in most of the judgments (l), yet it may be presumed that, independently of their ornamental nature, the construction and method of annexation to the house could not have been altogether disregarded; else, as a general authority, it would seem to carry the tenant's right of removal very far indeed (m).

Extent of privilege in respect of chimney-pieces considered.

(i) 6 Bing. at pp. 439, 440.

(k) *Lawton v. Lawton*, ante, p. 108.

(l) And see Bul. N. P. 34. *Greene v. Cole*, 2 Wms. Saund. 259 a; Harg. Co. Lit. 53 a.

(m) It is noticeable, however, that in *Bishop v. Elliott* (A.D. 1855), 24 L. J., Ex. 229, no qualification with reference to the method of annexation is placed upon the tenant's right to remove ornamental chimney-pieces. So far as the editors are aware, there is but one reported case (*Leach v. Thomas*, ante, p. 109) in which it was directly ruled that the tenant had such a right. See

per Platt, B., in *Elliott v. Bishop*, 24 L. J., Ex. at p. 42, citing a note in the 2nd edition of this work, which, in view of the decision of the Exchequer Chamber in that case, has been omitted in the present edition. Under the ancient rule of law, a tenant was liable in waste, if he pulled down the shelves, closets, presses, wardrobes, dressers, &c., belonging to the house. See *Lady St. John v. Piott*, 2 Bulst. 103; *Poole's case*, 1 Salk. 368; *Kinlyside v. Thornton*, 2 W. Bl. 1111; *Kimpton v. Eve*, 2 Ves. & Bea. 349.

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Difficulty in saying what degree of annexation prevents removal.

Unfortunately, there is a great absence of direct authority for ascertaining the degree of annexation short of that which took place in the conservatory case, and more intimate than a connection with screws, nails, or bolts, by which the tenant's privilege may be defeated (*n*). The determination, therefore, of intermediate cases must be subject to considerable uncertainty.

Permanent nature of the erection.

But besides the mode of annexation, it is to be observed, that there is a further circumstance to which the Courts have had regard in the discussion of these questions, and which Graham, B., considered to be a proper ground of decision in respect of ornamental fixtures. For when the above-mentioned case of *Buckland v. Butterfield* was before that learned judge at Nisi Prius, he was of opinion, that the pinery was not removable, because it might be deemed a permanent improvement (*o*). And Park, J., also explains the decision as to the conservatory, on the ground that it was deeply fixed in the soil, and formed part of the house to which it was attached (*p*). These opinions are also conformable to that expressed by Lord Kenyon in a previous case at Nisi Prius. For in *Dean v. Allalley* (*q*) his lordship is reported to have said that, "If a tenant will build upon premises demised to him a substantial addition to the house, or add to its magnificence, he must leave his additions at the expiration of his term for the benefit of his landlord" (*r*). And

(*n*) The somewhat prevalent idea that an annexation by nails is necessarily of a more permanent nature than that by screws would seem to be unfounded.

(*o*) See the case as reported in 4 Moore (C. P.), 440, *ante*, p. 111; and see the remarks of Kindersley, V.-C., in *Gibson v. Hammersmith Rail. Co.*, 32 L. J., Ch. at p. 341.

(*p*) *Grymes v. Boweren*, 6

Bing. at p. 440.

(*q*) 3 Esp. 11.

(*r*) If a lessee erects a new house where none was before, if he abate it, an action of waste lies against him. *Lord Darcy v. Asquith*, Hob. 234. And see Vin. Ab. tit. Waste, (E. 20); *Brock v. Beare*, 1 Bulst. 50. And see Lord Hardwicke's observations upon the legal maxim, that the principal thing shall not be de-

it is clear that things may be made so completely a part of the land, as being essential to its convenient use, that a tenant cannot remove them, as, for instance, doors and windows, locks and keys, bolts and bars, staircases and landings (s). Chap. II. s. 4.

Lastly, it is proper to notice one additional topic, which was mentioned by Lord Mansfield as a ground for permitting the removal of ornamental fixtures, viz., that the premises are left in the same state in which the tenant finds them, and that there is no injury to the landlord (t). So Kindersley, V.-C., in the case of *Gibson v. Hammersmith Rail. Co.*, in speaking of the tenant's right to remove trade fixtures, says: "I assume that if they cannot be removed without material injury to the freehold, the tenant has no right to inflict that injury, or to remove them at all" (u). Injury to the premises.

Where a tenant claims to remove an article under the law of fixtures, if it appears that the freehold will unavoidably be damaged by the severance of the property, though not to any very material extent, such damage may, it is thought, be more properly regarded as the subject of compensation to the landlord by the tenant (x). Indeed, it Whether injury not in some cases a subject for compensation.

stroyed by taking away the accessory. *Lawton v. Lawton*, 3 Atk. 13, 15, *ante*, p. 63.

(s) *Bishop v. Elliott*, 24 L. J., Ex. at pp. 40, 231; *Climie v. Wood*, L. R., 4 Ex. at p. 329. It seems that the tenant would be *technically* liable in trover for locks, &c., removed by him, although he substituted others of an improved pattern. As to where there is a covenant to deliver up all articles, &c., affixed during a term, see per Parke, B., in *Elliott v. Bishop*, 24 L. J., Ex. at p. 35,

post, p. 153.

(t) *Lawton v. Salmon*, 1 H. Bl. 260, *in notis*.

(u) 32 L. J., Ch. at p. 341. See also *Ex parte Barclay, In re Gawan*, 5 D. M. & G. at p. 410, and cases cited *ante*, p. 69. The remarks of Kindersley, V.-C., in the text, apply *a fortiori* to fixtures for ornament or convenience, as to which the tenant's right is less extensive than in the case of trade fixtures. See *post*, p. 126.

(x) Sect. 34 of the Agricul-

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appears to have been generally understood in practice, that as well where trading as where ornamental fixtures are taken down, the tenant is liable to repair the injury the premises may sustain by the act of removal; and, in like manner, that where a fixture has been put up in substitution for an article which was attached to the premises at the time of the demise, the tenant, on taking down his own fixture, is bound to restore the former article, or to replace it by another erection of a similar description (y).

Liability of
tenant to re-
pair injury.

The case of *Foley v. Addenbrooke* (z) furnishes some very important rules upon these points. In that case there were indeed covenants expressly referring to fixtures; but the observations of the Court appear to apply equally to all ordinary cases of removal. The lessee was bound to leave all the erections, buildings, improvements, &c., except, &c., in good repair; and it was held that in taking away certain large fixed machinery and apparatus, decided to be removable under the lease, the lessee might disturb such brickwork as was necessary to remove it, and that he was not bound to restore it to a perfect state, as if the articles it was intended to support or cover were still there; that it was sufficient for him to exercise his right to remove what the lease gave him authority to take, and in doing so, to displace the brickwork, and to leave it in such a state as would be most useful and beneficial to the lessors, or to those who might next take the premises. At the same time, in the exercise of this right, he was bound to do as little damage as possible; and was liable for any unnecessary disturbance of the brickwork, or any wanton damage to

tural Holdings Act, 1883 (46 & 47 Vict. c. 61), expressly provides that in the removal of any fixture the tenant shall not do any avoidable damage to any building or other part of the holding, and shall make good all damage occasioned

thereto by the removal. *Ante*, p. 89.

(y) See *Martyr v. Bradley*, 9 Bing. 24; *Sunderland v. Newton*, 3 Sim. 450. See too, *post*, pp. 152 *et seq.*

(z) 13 M. & W. 174.

the premises; or in case he left them in such a state as not to be conveniently applicable for similar purposes by the lessor or another tenant (a). Chap. II. s. 4.

It is, however, necessary to caution the reader, that it must not be inferred that a tenant may take away an article merely because the premises will not be impaired by removing it. Neither is it in itself a ground for the removal of an erection, that the premises are capable of being reinstated in their original condition (b). For it must always be remembered, that by the act of annexation to the freehold, the thing itself becomes a part of the reversionary estate (c). And the law has regard to the reversioner's interest, not only as it existed at the time of the demise, but also in its improved state, and as increased in value by any additions made by the tenant. Absence of injury not a conclusive ground for removal.

The several considerations pointed out in the foregoing pages, as affecting the right of a tenant to remove fixtures put up for ornament or convenience, will suggest the caution to be observed in the practical application of the indulgence which the law now concedes to him. From a review of these considerations it is evident that the tenant's right in respect of this class of fixtures depends, in a peculiar manner, on the facts of each individual case (d). And the important circumstances to be regarded in these cases are, first, the *mode of annexation* of an article, and the General observations as to right of removing matters of ornament, &c.

(a) Compare 46 & 47 Vict. c. 61, s. 34, *ante*, p. 89; and see *ante*, p. 118.

(b) In *Elwes v. Maw*, 3 East, 38, it was stated as a fact in the case, that the premises were left in the same state as when the tenant entered upon them; yet this was not thought a ground for the removal of the erections. So the removal of young trees is not allowed

(except in the case of a nurseryman), although the injury occasioned to the premises by digging them up might be immediately repaired. *Ante*, p. 102.

(c) *Ante*, p. 31.

(d) *Per* Dallas, C. J., in *Buckland v. Butterfield*, 2 Brod. & Bing. at p. 58. And see *per* Tindal, C. J., in *Grymes v. Boweren*, 6 Bing. at p. 439.

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extent to which it is united with the premises. Secondly, its *nature and construction*; as whether it has been put up for a *temporary* purpose, or by way of a *permanent and substantial* improvement (*e*). And, thirdly, the *effect* its removal will have upon the *freehold of the reversioner*. With reference, indeed, to this latter circumstance, it may be laid down as a rule applicable to all cases, that if the removal of any article will occasion considerable prejudice to the freehold, as by damaging the substance or fabric of the house, &c., a tenant will not be entitled to take it away. Lastly, it should be observed, that if there is any *custom* or prevailing usage, such as that of valuing to incoming tenants, &c., this may be considered, in the absence of decision, as a safe and useful criterion in practice (*f*). The privilege of the tenant in removing fixtures on the ground of ornament or convenience, must be regarded as one of a more limited nature than that in respect of trade fixtures (*g*). It is an indulgence which, according to the remark of Dallas, C. J. (*h*), is an exception only, and, though to be fairly considered, is not to be extended (*i*).

(*e*) In *Buckland v. Butterfield*, *supra*, it was argued by counsel, that the *intention* of the party in putting up an erection ought to be attended to, and that this might be collected from the nature of his interest in the premises. And see *ante*, p. 71.

(*f*) As to the effect of custom in question of fixtures, see *ante*, p. 66.

(*g*) *Whitehead v. Bennett*,

27 L.J., Ch. at p. 275; *Gibson v. Hammersmith Rail. Co.*, 32 L.J., Ch. at p. 341; *Syme v. Harvey*, 24 D. at pp. 213, 214, per Lord Deas.

(*h*) *Buckland v. Butterfield*, *ante*, p. 112.

(*i*) The reader will see a summary of the particular articles which may be removed by a tenant on the ground of ornament and furniture, in Appendix (B.).

SECTION V.

Of the Time when a Tenant may remove Fixtures, as affected by the Nature and Duration of his Interest in the Premises.

HAVING in the preceding sections pointed out the description of property which a tenant is entitled to remove as fixtures, the next object of inquiry is as to the time of the removal, with reference to the continuance and termination of the tenancy. Chap. II. s. 5.

It has never been implied in any of the decisions, that the property which an ordinary tenant is permitted to take away, depends in any degree on the nature of his interest in the premises. On the contrary, it appears that whether the tenant is lessee for years, tenant from year to year, or tenant at will, and whether his term is uncertain or otherwise, his right as to the description of articles he is authorized to remove is in every respect the same. But with regard to the time within which the tenant must exercise his privilege, a distinction may obviously exist. For a tenant who is aware of the period when his interest will expire, may be expected to use a greater degree of vigilance in removing his fixtures, than one who, from the nature of his estate, is uncertain how long he may continue in possession of the demised premises. The object, therefore, of the present section, is to point out the rules which the law has prescribed to tenants with regard to the time of removing their fixtures (a).

Nature of interest in premises, how far important.

(a) It must be understood that the rules laid down in this section are applicable only where there is no special agreement which may affect

the question : as to which see *post*, pp. 145 *et seq.* And as to cases falling within the Agricultural Holdings Act, 1883, see *ante*, p. 93.

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Tenant for a time certain must remove fixtures within term.

And, first, of a termor who knows when his interest in the premises will expire. From the earliest recognition of the tenant's right, it was always considered that he was bound to use his privilege in removing his fixtures, during the continuance of his term. Thus in the Year Book, 20 Hen. 7, p. 13, the Court, speaking of the furnaces set up by a lessee for years, say: "If he permit them to remain fixed to the soil after the end of his term, then they belong to the lessor." And the *dictum* of Kingsmill, J., in 21 H. 7, p. 27, is to the same effect. In like manner in *Poole's case* (b), it was said by Lord Holt, that during the term the soap-boiler might well remove the vats; but, after the term, they became a gift in law to him in reversion, and are not removable.

The rule is laid down in the same terms in the more modern decisions. Thus, in the case of *Lyde v. Russell* (c), it was expressly recognized and approved by Lord Tenterden, C. J. His Lordship adds, "According to these authorities, then, the property in fixtures which would be in the tenant if he removed them during the term, vests in the landlord on the determination of the term" (d). Many other cases might be cited in confirmation of this doctrine (e), but it will be sufficient to refer to the following

(b) 1 Salk. at p. 368. And see *Ex parte Quincy*, 1 Atk. 477; *Lord Dudley v. Lord Warde*, Amb. 113; Br. Ab. tit. Chattels, pl. 7; Com. Dig. tit. Wast (D. 2); Went. Off. Executors (14th ed.), pp. 150, 151.

(c) 1 B. & Ad. 394.

(d) In the notes to *Elwes v. Maw*, 2 Sm. L. C. (8th ed.), p. 205, it is said, "This case, with which, although the judgment is not long, Lord Tenterden is said to have taken great pains, goes a

"step further than any prior decision, for it shows that on the tenant's quitting the land the property of fixtures vests so completely in the landlord, that even though they are subsequently severed and made chattels, the tenant's right to them does not revive." The American case of *Stokoe v. Upton*, 29 Am. Rep. 560, is a decision to the like effect.

(e) *E.g.*, *Lee v. Risdon*, 7 Taunt. at p. 191; *Colegrave v. Dias Santos*, 2 B. & C. at

passage from the judgment of Lord Hatherley in *Meux v. Jacobs* (*f*) :—“ The law has held that trade fixtures may be,
 “ at any time during the limited interest which the owner
 “ of the lease may have, removed by him, yet, if he do
 “ not remove them during the lease (as in the old case that
 “ was cited, before Holt [*Poole's case*, 1 Salk. 368]), he is
 “ held to have allowed them to pass to the owner of the
 “ reversion, because, and only because, they are attached to
 “ his reversion; and if they are not removed, as the law
 “ would have enabled the person to remove them during
 “ the lease, they must be considered to have returned at
 “ once and finally to the owner of the reversion.”

Chap. II. s. 5.

The authorities, therefore, all agree as to the period of time within which a tenant must remove his fixtures. And it is sufficiently obvious that the principle on which this rule is founded applies alike to all descriptions of fixtures, whether for trade or otherwise. Accordingly, in general, if a tenant remove fixtures after the expiration of his term, he will commit a trespass (*g*). There has been some confusion, however, amongst the authorities as to the grounds upon which this rule is based. In some cases, as in that before Lord Holt (*h*), it has been explained upon the ground of a presumption of gift by the tenant to the reversioner, the omission to sever the fixtures within the time limited by the law being considered tantamount to an express gift. But we have seen (*i*) that the tenant by the very act of annexing a chattel to the freehold, makes it a part of the reversioner's property and retains only a

Ground of rule.

p. 79; *Elwes v. Maw*, 3 East, at p. 52; *Hallen v. Runder*, 1 Cr., M. & R. at p. 275; *Gibson v. Hammersmith Rail. Co.*, 32 L. J., Ch. at p. 341; *Pugh v. Arton*, L. R., 8 Eq. at p. 629; *Climie v. Wood*, L. R., 4 Ex. at p. 329; *Bain v. Brand*, 1 App. Cas. at p. 772.

(*f*) L. R., 7 H. L. at p. 490.

(*g*) See *Ex parte Quincy*, and *Lord Dudley v. Lord Warde*, *supra*, note (*b*).

(*h*) *Poole's case*, *supra*. And see *Ex parte Brook*, *In re Roberts*, 10 Ch. D. at p. 109.

(*i*) *Ante*, pp. 28, 31.

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Tenant retaining possession after expiration of term.

It is clear from the above decisions, that fixtures unsevered by the tenant during his term pass to the landlord when he takes possession of the demised premises on its expiration. A question arises, however, as to the right of a tenant who retains possession of the premises after his term has expired. Has he in such a case the right to sever fixtures as long as he keeps actual possession of the demised premises?

Penton v. Robart.

This point has been the subject of discussion in several cases. The earliest of these is the case of *Penton v. Robart* (*l*), which was an action of trespass for breaking and entering a certain yard and buildings; and breaking down the buildings, and the materials of a fence; and taking away certain timbers, bricks and lead. As to the breaking the yard, the defendant suffered judgment by default, and pleaded the general issue to the rest of the trespass. At the trial before Lord Kenyon, C. J., it appeared (*m*) that the defendant was in possession as an undertenant, and had erected upon the premises a building

(*j*) *Heap v. Barton*, 12 C. B. at p. 278, per Jervis, C. J.; *Gibson v. Hammersmith Rail. Co.*, 32 L. J., Ch. at pp. 342, 343; *Meux v. Jacobs*, per Lord Hatherley, *supra*; *Bain v. Brand*, 1 App. Cas. at p. 767, per Lord Cairns, C.

(*k*) *Gibson v. Hammersmith Rail. Co.*, *supra*; and see *post*, p. 142.

(*l*) 2 East, 88.

(*m*) See 4 Esp. 33. See also the remarks on this case, *ante*, p. 60.

consisting of a superstructure of wood upon a brick foundation, in which he carried on his trade. The original term expired at Michaelmas, 1800, in consequence of a notice to quit from plaintiff, who was the superior landlord. It was admitted that the plaintiff had recovered judgment in ejectment against the defendant for those very premises, though the fact was not proved at the trial. But the defendant remained in possession for some time afterwards, and was, in fact, in possession at the time when he pulled down the wooden superstructure, and carried away the materials, which was the subject of the action.

A verdict was taken for the plaintiff, subject to the question, whether the defendant was warranted in pulling down the building, and taking away the materials after the expiration of the term. A rule nisi having been obtained for entering a verdict for the defendant, as to all but the trespasses confessed of breaking and entering the yard; it was argued that the defendant had no right to remove the building after the term was expired, for that he was a trespasser by the act of coming or continuing upon the premises, and that the law could never give a man a right, and yet make him a trespasser in the only act by which he could exercise it. Lord Kenyon, C. J., said:—"Here the defendant did no more than he had a right to do; he was, in fact, still in possession of the premises at the time the things were taken away, and therefore there is no pretence to say, that he had abandoned his right to them." And Lawrence, J., said:—"It is admitted now that the defendant had a right to take these things away during the term: and all that he admits upon this record against himself, by suffering judgment to go by default as to the breaking and entering, is, that he was a trespasser in coming upon *the land*, but not a trespasser *de bonis asportatis*; as to so much, therefore, he is entitled to judgment." A verdict was, therefore, entered for the plaintiff as to the trespass in

Judgment of
Lord Kenyon,
C. J.

Judgment of
Lawrence, J.

Part I.

breaking and entering; and for the defendant as to the rest of the trespass.

Decision in
Penton v.
Robart ex-
amined.

It is important to observe that the decision in question depends essentially upon two points; the fact of the continued possession, and the state of the record. It will be seen that the Court considered that the reason why, in common cases, a tenant could not insist upon his privilege if he had neglected to use it during the term, was that the law presumed that he meant to leave the unsevered property for the benefit of his landlord (*n*). But, in *Penton v. Robart*, the tenant had never quitted possession; and, consequently, as he showed no intention of abandoning his right to the property, the Court thought that the presumption of a gift to the landlord did not arise. The tenant, however, did not contend that he had a right of remaining or coming upon the premises for the purpose of removing the building; he disclaimed that altogether, and suffering judgment by default, he admitted that he was a trespasser on the land. All that he insisted upon was, that he had still a right to reduce the materials of the varnish-house again to a chattel state, and to retain them when severed; and that he could not, therefore, be a trespasser *de bonis asportatis* (*o*).

Possibly
erection a
mere chattel.

It may be observed, that for the reasons given in a former chapter (*p*), the case might perhaps admit of another explanation. For the erection might be deemed (like the barn resting upon blocks or pattens (*q*)) not a fixture, but

(*n*) But see as to this presumption, *ante*, p. 129.

(*o*) See Hammond's Treatise on Nisi Prius, p. 147; and his addition of Comyn's Digest, tit. Wast (D. 2). According to the report of the case of *Penton v. Robart* at Nisi Prius, 4 Esp. 33, the inclination of Lord Kenyon's mind certainly seemed to be,

that a tenant had a right to come upon the premises after the term was expired, for the purpose of taking away a fixture which he might have removed during the term.

(*p*) *Ante*, p. 60; and see *Decble v. M'Mullen*, 8 Ir. C. L. R. at p. 362.

(*q*) *Wansbrough v. Maton*, 4 A. & E. 884; *post*, p. 142.

a mere chattel. In this point of view, the simple question for determination would have been, whether the personal chattel in dispute was the defendant's or not; and the result of the whole case would, upon the pleadings, have been the same as it now stands (*r*). On the whole, however, the former explanation of the case appears to be the true one.

Chap. II. s. 5.

But whatever may be the grounds upon which the Court proceeded in *Penton v. Robart*, and even admitting it to be a valid authority upon the particular facts of the case, it is clear that it cannot be accepted as a binding decision that the mere fact that the tenant has retained actual possession of the demised premises after the expiration of his interest, has the effect of extending the period during which he may sever fixtures. A tenant who remains in possession after the determination of his tenancy by the service and expiration of a regular notice to quit, without any *bond fide* right so to do, cannot by such tortious overholding

Mere fact of tenant retaining possession does not entitle him to remove fixtures.

(*r*) If a man whose term in a house is expired go into it when the door is open, to take away goods left by him there, *trespass quare clausum fregit* lies; for it was his own folly to leave the goods there, Yr. Bks. 13 H. 7, p. 9; 22 Ed. 4, p. 27. And see Br. Ab. tit. Trespass, pl. 430. See, also, the same principle as to a barn, &c. fixed to the freehold, and as to chattels, *Anthony v. Haney*, 8 Bing. 186. As to the tenant's right of action to recover chattels left upon the demised premises, see *post*, pp. 142, 372. It has been held that a custom for a lessee for years to remove his utensils within a certain period after his term expires is bad in law, *White v. Sayer*, Pal-

mer, 211; compare *Cornish v. Stubbs*, L. R., 5 C. P. 334. There are, however, cases where a person is entitled to enter the soil of another to take his own goods, in peculiar circumstances, or of necessity. Thus, if a fruit tree grow in a hedge, and the fruit drops on to the ground of another, the owner may go upon the land and fetch it. Vin. Ab. tit. Trespass (L. a) 6. So if a tree is blown down, or through decay falls into a neighbour's land, the owner may lawfully enter and take it. *Millen v. Hawery*, Latch, 13; and see *ante*, p. 35. See other instances referred to and explained by the Court in *Anthony v. Haney*, *supra*.

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acquire a right as against his landlord to remove fixtures which, on the determination of the tenancy, passed to the landlord as part of his reversion (*s*).

Secus, as to tenant retaining possession under right still to consider himself as tenant.

Weston v. Woodcock.

There is, however, one qualification upon the general rule that a tenant can only sever fixtures during the continuance of his term, which is justified by later authorities. This qualification was thus expressed by Alderson, B., in delivering the judgment of the Court of Exchequer in *Weeton v. Woodcock* (*t*). "The rule to be collected from the cases decided on this subject seems to be this, that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds the premises *under a right still to consider himself as tenant.*" Or, in the words of Parke, B., in *Mackintosh v. Trotter* (*u*), "the tenant has the right to remove fixtures of this nature during his term, or, during what may, for this purpose, be considered as an *excrescence* on the term."

Quære, as to cases falling within the qualification.

It is somewhat difficult to see what cases can be said to fall precisely within this qualification upon the general rule, or what constitutes such an "excrescence" upon the original term; and this difficulty is increased by the fact that in no reported case has a tenant actually succeeded in establishing such extended right, although the authority of the above proposition has never been impeached. It seems clear that the learned judges were not contemplating cases in which the tenant retains possession of the demised

(*s*) *Deeble v. M'Mullen*, 8 Ir. C. L. R. 355, 365, per Monahan, C. J.

(*t*) 7 M. & W. 14, 19. And see *Minshall v. Lloyd*, 2 M. & W. 450; *Mackintosh v. Trotter*, 3 M. & W. 184; *Leader v. Homewood*, 27 L. J., C. P. 316; *London and*

Westminster Loan, &c. Co. v. Drake, 28 L. J., C. P. 297, 299; *Climie v. Wood*, L. R., 4 Ex. at p. 329; *Ex parte Stephens, Re Lavies*, 7 Ch. D. 127, 130; *Ex parte Brook, In re Roberts*, *infra*.

(*u*) 3 M. & W. 184, 186.

premises under a new tenancy (v). In a recent case (w) Chap. II. s. 5. the late Lord Justice Thesiger, in delivering the judgment of the Court of Appeal, after remarking that it was difficult to define precisely the meaning of the above propositions in *Weeton v. Woodcock* and *Mackintosh v. Trotter*, *Ex parte Brook, In re Roberts.* said—"It may be that in cases where a tenant holds over
 "after the expiration of a term certain under a reasonable supposition of consent on the part of his landlord,
 "or in the case where an interest of uncertain duration comes suddenly to an end, and the tenant keeps possession for such reasonable time only as would enable him to sever his fixtures, and to remove them with his goods and chattels off the demised premises, or even in cases where the landlord exercises a right of forfeiture (x), and the tenant remains on the premises for such reasonable time as last referred to, the law would presume a right to remove tenant's fixtures after the expiration or determination of the tenancy" (y).

Possibly, the principle laid down in *Weeton v. Woodcock* Tenants at sufferance. would also meet the case of a tenant who has agreed to accept the despatch through the post of a notice to quit as a sufficient service by his landlord, where, as a fact, such notice never having been delivered, the tenant continues in possession of the demised premises under the supposition that his tenancy is undetermined. In such a case he would certainly seem to be holding the premises under a moral, though not, of course, a legal right still to consider

(v) As to this, see *post*, p. 156.

(w) *Ex parte Brook, In re Roberts*, 10 Ch. D. 101, 109.

(x) But as to this see *post*, p. 137.

(y) In the course of the argument in this case, James, L. J., said:—"The word 'excrescence' *ex vi termini* means something growing

"out of the original term, such as a tenancy at will after its expiration." It is thought, however, that this dictum cannot be relied upon. It certainly does not seem consistent with the above remarks in the judgment, which seem carefully framed to exclude the case of a new tenancy.

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*Leader v.
Homeood.*

himself as tenant. It should be mentioned, however, that in *Leader v. Homeood* (z), the Court doubted whether the above qualification would justify a tenant at sufferance in severing fixtures during the time he continues in possession. It is submitted that such tenant would not be permitted to do so in the absence of a reasonable and *bond fide* supposition on his part of a right still to continue as tenant. In the last-mentioned case, the plaintiff's term expired by effluxion of time at Michaelmas, 1847. He, however, refused to give up possession of the premises, and upon the 12th of October the landlord served him with a notice demanding possession. The plaintiff quitted the premises upon the following day, leaving behind him (*inter alia*) certain tenant's fixtures which he had not severed. On the 14th October he returned to the house, but the landlord had in the meanwhile granted a new lease to the defendant, who was in possession of the premises, and refused to admit the plaintiff. In an action for the conversion and detention of the fixtures, the jury found that the plaintiff had not abandoned them to the landlord, and, under the direction of Byles, J., before whom the case was tried, a verdict was entered for the plaintiff, with leave to the defendant to move to enter a nonsuit or verdict for him. The Court made absolute a rule to this effect, upon the ground that at the time when the plaintiff was prevented from severing the fixtures he had ceased to be a tenant of any kind, or to hold the premises under any right to consider himself as such.

No right
where posses-
sion tortious.

In *Decble v. M'Mullen* (a), which was an action to recover damages for the severance and removal of trade fixtures in a mill, the facts were shortly as follows:—The mill was demised to a tenant for three lives, renewable for ever. All the *cestuis que vies* having died, and there having been no renewal, the plaintiff, the reversioner,

(z) 27 L. J., C. P. 316.

(a) 8 Ir. C. L. R. 355.

obtained a decree of ejectment against the persons in whom the estate and interest of the original lessee had vested, with a stay of execution for one month. Before the expiration of that time, the tenants filed a petition for renewal (*b*), and obtained an interim injunction against execution of the decree of ejectment. On the 26th June, 1856, this injunction was dissolved, and the petition was dismissed. On the 28th of June the defendant, who was tenant to an underlessee, received notice of the plaintiff's intention to take possession of the premises. Possession was accordingly taken by the plaintiff upon the 1st of July; but in the interval between that day and the 28th of June, the defendant removed the fixtures in question from the premises. The majority of the Court of Common Pleas in Ireland gave judgment for the plaintiff, upon the ground that the defendant was not entitled to sever and remove the fixtures in question after the expiration of the term, and at a time when, although he was *de facto* in possession, such possession was tortious (*c*).

The rule that a tenant is bound to use his privilege of removing his fixtures during the continuance of his term applies equally to cases where the tenant by any act of his own puts an end to the term, as where it expires by effluxion of time. Thus, the rule applies in the case of forfeiture by a tenant (*d*). Of this the case of *Minshall v.*

General rule applies, although term ended by forfeiture, &c.

(*b*) The defendant was not a party to this petition.

(*c*) Ball, J., concurred in the judgment; but upon the ground that the stay of execution must be taken to have been made by consent, and that therefore the defendant was party to an arrangement whereby he was bound to leave the premises in the same condition as at the time of the decree in ejectment. As to this, see *post*, p. 155.

(*d*) So also in the case of a breach of condition. As to the difference between determination of a term by breach of a condition, and by re-entry for a forfeiture, see *Liddy v. Kennedy*, L. R., 5 H. L. at p. 154, per Lord Westbury. The landlord's right of forfeiture has been considerably curtailed by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14.

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*Minshall v.
Lloyd.*

Lloyd (e) affords an instance. There a tenant took a lease of a colliery, and during the term erected steam engines thereon. Afterwards, in 1827, he assigned the premises to trustees, in trust to secure the payment of an annuity, and to permit him to enjoy them until default, &c. In June, 1829, the landlord took possession of the colliery and fixtures under a clause of re-entry for forfeiture; and in November of the same year, the engines were seized under a *fi. fa.* at the suit of an execution creditor of the tenant. The trustees brought an action against the sheriff to recover the engines. It was held, in accordance with the authorities above mentioned, that the right of the tenant to remove these fixtures ceased in June, 1829; and that as they had been left affixed to the freehold after the expiration of the term, the trustees, who had only the same right of removal as the tenant under whom they claimed, could not themselves remove them after that period (f).

*Weeton v.
Woodcock.*

The case of *Weeton v. Woodcock* (g), also in the Court of Exchequer, is to the same effect. There a tenant took a lease of a cotton factory, there being a proviso that the lease should be forfeited by the bankruptcy of the lessee. During the term, the lessee erected a steam-engine boiler on the premises, and subsequently became bankrupt; his assignees entered and took possession, after which the lessor entered in order to enforce the forfeiture: three weeks after such entry the assignees, who still continued in possession, removed and sold the boiler. The lessor thereupon sued the assignees in trover for this fixture, and at the trial the jury found that it had not been disannexed

(e) 2 M. & W. 450. See also in *Storer v. Hunter*, 3 B. & C. 368.

(f) It should be noticed that in this case the plaintiffs were not in possession at the time of action brought; also,

that the right of the execution creditor as against the lessor was not in question.

(g) 7 M. & W. 14. See per Parke, B., in *Mackintosh v. Trotter*, 3 M. & W. 184.

within a reasonable time. It was held, in conformity with Chap. II. s. 5. the general rule and on the authority of the last-mentioned case, that the right of the tenant to remove the fixtures ceased after the entry for the forfeiture: so that the assignees were then no longer in a condition to consider themselves as tenants. The Court also said that even if the assignees had the right, in a case where the entry determining the tenancy is the act of a third person, to consider themselves entitled to a reasonable time for removing the fixture, the jury had found that they had not availed themselves of that privilege.

In a later case of *Pugh v. Arton* (*h*), Malins, V.-C., decided that a grantee under a deed conveying all the estate and effects of a tenant for the benefit of his creditors, was not entitled to sever and remove fixtures after the landlord had entered for forfeiture, even within a reasonable time of such entry. His Honour said that the only instance in such cases in which the general rule had been relaxed, was where there was an express contract between the parties that the tenant should have the right to remove fixtures (*i*). *Pugh v. Arton.*

It is plain from the two last-mentioned cases that, so far as the tenant himself is concerned, he has no right, although he remains in possession, to sever fixtures after the entry of the landlord for forfeiture. For, although the Court of Appeal in *Ex parte Brook, In re Roberts* (*j*) threw out a suggestion that possibly there might be a relaxation of the general rule in such cases, *Pugh v. Arton* does not appear to have been cited before them, and the suggestion formed no part of the decision which was as to the effect of a disclaimer of a lease under the Bankruptcy Act, 1869 (*k*).

(*h*) L. R., 8 Eq. 626. In this case the defendant had forcibly ejected a man put into possession by the landlord.

(*i*) See *post*, p. 162.

(*j*) 10 Ch. D. at p. 109; *ante*, p. 135.

(*k*) As to this, see *post*, p. 314.

Part I.

Trustees in
bankruptcy in
no better
position than
tenant.

The cases of *Minshall v. Lloyd*, *Weeton v. Woodcock* (l) and *Pugh v. Arton* also establish that the rights of assignees or trustees in bankruptcy are, in this respect, no greater than those of the tenant whose right they claim to exercise.

Position of
under-tenants
where for-
feiture by
tenant.

In the present state of the authorities, it is doubtful what is the position of an under-tenant in this respect on the occurrence of a forfeiture by the act of the mesne tenant. The point does not seem as yet to have presented itself for decision; but it is submitted that as the forfeiture is in respect of the act or default of a third person, the under-tenant in such circumstances ought to be accorded the same privilege as is given in the case of tenancies of an uncertain duration (m).

Effect of
surrender
upon right to
remove.

If a tenant simply surrenders his term to his landlord, he has no right subsequently to sever fixtures, for at the date of the surrender they form part of the freehold, and the law has no right to limit the effect of the surrender by excluding from it that which legally passes by it (n). But a tenant cannot defeat his own grant by a subsequent voluntary act of surrender; for in regard "to strangers" who were not parties or privies thereto (lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender) the estate surrendered hath in consideration of law a continuance" (o). Thus, it has been held that where a

(l) The fact that in this case the assignees had not severed the fixture within a reasonable time was only given as an additional reason for the judgment. See *ante*, p. 139.

(m) As to this, see *post*, p. 143. And see *Bulwer v. Bulwer*, 2 B. & Ald. 470, *ad fin.* That an under-lessee loses his estate on forfeiture of the lease, see *G. W. R. Co. v.*

Smith, 2 Ch. D. 235; *S. C.* in H. L., 3 App. Cas. 165. See now the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14, sub-s. 3.

(n) *Ex parte Brook*, *In re Roberts*, 10 Ch. D. at p. 110.

(o) Co. Lit. 338 b. As to the effect of disclaimer by a trustee in Bankruptcy, see *post*, p. 316.

tenant mortgages fixtures to A., and subsequently surrenders his lease to his landlord, he cannot thereby deprive the mortgagee of his right to enter and sever the fixtures within a reasonable time, and the latter may therefore maintain an action against an incoming tenant who has prevented him from exercising that right (*p*). So, too, the determination of a term by surrender does not prevent a previous purchaser of fixtures from removing them within a reasonable time after notice of the surrender (*q*). Chap. II. s. 5.

With reference to the subject under discussion in this section it might possibly be argued that the tenant's right would be preserved if, by some formal act or declaration, he expressly signified his intention not to abandon the fixtures at the end of his term. For example, if he were to accompany the delivery of possession of the premises, with a protestation that he does so without prejudice to his right of taking away his fixtures at a future time, and does not intend to give them to the landlord (*r*). Or, again, that any recognition of the tenant's right on the part of the landlord would have the effect of re-vesting the property in the tenant (*s*). On these points nothing satisfactory is to be collected from the authorities; but it is submitted that as the landlord's right to the fixtures does not arise from a presumption of gift, but from the fact that they form a part of the land (*t*), such proceedings would probably be held to be inoperative on the principles explained in the case of *Marston v. Roe* (*u*). Delivery of possession without prejudice, &c.

(*p*) *London and Westminster Loan, &c. Co. v. Drake*, 28 L. J., C. P. 297.

(*q*) *Saint v. Pilley*, L. R., 10 Ex. 137. Compare *Moss v. James*, 47 L. J., Q. B. D. 160; affirmed in C. A., 38 L. T. 595.

(*r*) This is stated to have been done in the case of *Davis v. Jones*, 2 B. & Ald.

at p. 166.

(*s*) See *Lyde v. Russell*, 1 B. & Ad. at p. 396; *Minshall v. Lloyd*, 2 M. & W. at p. 458; *West v. Blakeway*, 2 M. & G. 729.

(*t*) See *ante*, p. 129.

(*u*) 8 A. & E. at p. 59. And see *Torrey v. Burnett*, 20 Am. Rep. 421.

Part I.

Landlord's
permission to
leave fixtures
on premises.

Where a landlord's attorney sent to the tenant a letter stating that the landlord had no objection to the tenant's leaving fixtures on the premises and making the best terms he could with the incoming tenant, it was held that this letter did not amount to a licence to the tenant to enter at any time and remove the fixtures. The Court also held that, even if it were to be looked upon as a licence, it would not bind the incoming tenant as not being by deed (*v*). Where, however, a landlord agrees on the expiration of a term to endeavour to effect a sale of fixtures for the tenant delivering up possession, there may be an implied agreement that the tenant shall be at liberty to remove them within a reasonable time if the sale is not effected (*w*). It is a common and very proper precaution, to provide for the removal of fixtures after the end of the demised term, by a particular provision in the tenant's lease (*x*).

General rule
not applicable
unless pro-
perty affixed.

It is obvious that the rule established in the several authorities above considered cannot apply to cases where, from the construction of the property in question, and its connection with the realty, it is not accounted a fixture at all, but is considered in law to remain a mere chattel (*y*). Thus, where a tenant erected a barn on the demised premises, which was so constructed that it was not united to the soil, but rested on the foundation by its own weight alone, it was held that, although the tenant left this barn on the premises after the expiration of his term, he did

(*v*) *Roffey v. Henderson*, 21 L. J., Q. B. 49.

(*w*) See *Torrey v. Burnett*, 20 Am. Rep. 421.

(*x*) See *Hallen v. Runder*, 1 Cr., M. & R. 226, where a tenant forebore to remove his fixtures during the term, his landlord agreeing to take them at a valuation, and it

was held that he might afterwards recover their value. As to the continuing possession and right of property of an outgoing tenant, see *Beaty v. Gibbons*, 16 East, 116, as explained in the next section, *post*, p. 162.

(*y*) See *ante*, Chap. I. p. 2.

not relinquish his right to it, but might afterwards recover Chap. II. s. 8. it from his landlord by action (z).

In accordance with the observation already made (a), the preceding remarks are to be understood as applying only to tenancies, the determination of which might be previously ascertained. For although no decision has expressly established, that tenancies which are of uncertain nature and duration are excepted out of the general rule, yet it has frequently been stated that tenants of such interests, as tenants for life, at will, &c. (b), are not so restricted, but will be allowed to remove their fixtures within a reasonable time after the expiration of their estates. No laches can in such cases be imputed to them for not availing themselves of their privilege during the term (c). This exception is supported by the analogy of the rule in the case of emblements, where a similar indulgence is allowed to tenants for life, &c., on the equitable principle, that a party shall never be prejudiced by the sudden determination of his term. As regards agricultural tenants, however, a change has been made by 14 & 15 Vict. c. 25, s. 1, to the effect that a tenant at rack rent, whose tenancy has determined by the death or cesser

Tenants of uncertain interests.

(z) *Wansbrough v. Maton*, 4 A. & E. 884. See also *Davis v. Jones*, 2 B. & Ald. 165; *Wilde v. Waters*, 24 L. J., C. P. at p. 195, per Maule, J. And see *ante*, p. 132.

(a) *Ante*, p. 127.

(b) Where a lease was granted by an agent without sufficient authority, during the absence of the owner of the premises, and it was terminated by the owner on his return from abroad, it was decided by the Supreme Court of Massachu-

setts, that the tenants could remove fixtures within a reasonable time after such termination. *Antoni v. Belknap*, 102 Mass. 193.

(c) See *Oakley v. Monck*, L. R., 1 Ex. at p. 164; *Pugh v. Arton*, L. R., 8 Eq. at p. 630; *Ex parte Brook*, *In re Roberts*, 10 Ch. D. 100; *Deeble v. M. Mu.* L. R. at p. 365; *First National B. bridge*, 26 Am. R. See also Yr. B. p. 27; *Stodden* Cro. Jac. 204; C

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of the estate of a landlord entitled for his life, or for any other uncertain interest, shall continue to hold until the expiration of the current year of his tenancy. This seems to place such tenants on the footing of ordinary tenants for terms certain as regards the time within which they must remove fixtures (*d*).

(*d*) For a summary of rules relating to fixtures as between landlord and tenant, see Appendix (B).

SECTION VI.

Of the Effect of Contract and the Terms of the Tenancy in respect of Fixtures.

THE doctrine of fixtures has been investigated in the preceding sections, on the supposition that there was nothing in the terms of the demise to control or affect the tenant's right of removal. It remains now to consider what effect is produced upon the relative interests of the landlord and tenant, when they have bound themselves by any agreement which, directly or by implication, has relation to fixtures (a). Chap. II. s. 6.

It is a principle applicable to the law of fixtures, as well as to every other branch of law, that individuals, on entering into a contract, may agree to vary the strict position in which they would otherwise legally stand towards each other; that is, where no absurdity or general inconvenience would result from the transaction. "*Modus et conventio* Tenant's right in fixtures, how affected by contract.

(a) The reader must observe, that this section more particularly relates to the terms of the tenancy, as affecting the right to things put up by the tenant himself and which are properly the subject of the law of fixtures, and that it does not refer to those provisions in leases, &c., which concern things annexed to the freehold *at the time* of the demise; as, when a person, on becoming tenant, agrees to purchase of the landlord articles affixed to the demised premises. In letting houses, &c., a stipulation is often made that "Fixtures are to be taken at a valuation." Here there is an absolute transfer of property, as on a sale of growing timber. The effects of agreements of this latter description are considered in the chapter relating to the conveyance of fixtures, *post*, pp. 289 *et seq.*, where will be found some observations upon fixtures acquired by a demise of premises with fixed machinery.

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extent, it was held that the lessee was precluded from removing any of the engines and fixtures, and that the lessor was entitled to the whole of them; on the ground that this appeared to be the intention of the parties according to the construction of the lease. And Alexander, C. B., observed, that if there had been no provisions respecting the machinery, it might have been taken away by the tenant, according to the general rules; but such rules were liable to be varied by agreement of the parties; and he thought that the terms of the indenture showed it to be intended in this case, that in the event that had happened, the lessor should have the fixtures as well as the land and buildings.

Renunciation
of right to
remove
fixtures
during term.

A similar stipulation was the subject of decision in *Dumergue v. Rumsey* (*h*). There a tenant was in possession of premises under an agreement that, until the execution of a lease, he should be bound by the terms and covenants of the intended lease as fully as if it had been executed. The draft lease annexed to the agreement provided that in case the term should be determined by effluxion of time, but in no other case, it should be lawful for the tenant within twenty-one days next after the expiration of the term, but not during any other period, to remove such fixtures as he might have attached to the premises, and as might lawfully be removed. The draft lease also contained a proviso that if any execution should be levied upon the premises, it should be lawful for the lessor to re-enter, and to seize and retain all fixtures whatsoever, whether tenant's, or trade fixtures, or otherwise. The Court of Exchequer Chamber held that the effect of these provisions was the renunciation by the tenant of his right to remove tenant's fixtures during the term, and that the landlord was entitled to such fixtures as against execution creditors.

(*h*) 33 L. J., Ex. 88..

In another case (i), a lessee covenanted to yield up the demised premises at the expiration of the term, together with all erections and improvements which during the term should be made, erected, or set up. During the term the lessee erected a greenhouse on the demised premises; it was built of wood on a frame fixed upon a wooden plate, which was laid upon mortar placed in the indents of walls erected for the purpose for the front and sides, the back being formed by an old wall; no holes were made in any part of the walls, the greenhouse being erected with a view to removal. Before the expiration of the term, the lessee removed the greenhouse, leaving the walls and ground flues, and doing no injury to the premises. It was held, that under the terms of his covenant the lessee was not entitled to take away the greenhouse, and that the removal was a breach of it. For the Court was of opinion that the greenhouse was to be considered an "erection or an improvement," and therefore within the meaning of the covenant entered into between the parties.

Chap. II. s. 6.

Covenant to deliver up all erections and improvements.

Analogous to these cases is that of *The Earl of Mansfield v. Blackburne* (j). In that case the general right of the tenant to take away the property in dispute was admitted; but the question was considered not to turn on any rule of law relating to fixtures, but to depend only upon the legal construction of the covenant entered into between the parties, which was equally applicable whether the property was a fixture or not. There a renewed lease was granted

Covenant to leave premises and works at end of term.

(i) *West v. Blakeway*, 2 M. & G. 729. In the above case, two of the judges expressed an opinion that according to the construction of the building in question it became annexed to the freehold. A second point decided by the case was, that a parol licence and permission given by the lessor to the lessee to remove

the building was no answer to an action on the covenant. In *Penry v. Brown*, 2 Stark. 403, Abbott, J., was of opinion that a veranda, the lower part of which was attached to posts which were fixed in the ground, fell within the terms of a similar covenant.

(j) 6 Bing. N. C. 426.

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of certain salt works, messuages, wych houses, erections, and other things erected upon the premises. In the lease the tenant covenanted to repair the buildings, works, &c., and to leave the premises and the works, engines, &c., in good repair at the end of the term. It appeared that under the former lease the lessee had put up at his own expense divers erections, engines, &c., for carrying on the manufacture of salt; and had also put up certain salt pans. These pans were composed of plates of iron, which rested by their own weight, without any fastenings, upon low brick walls. They had rings in their sides by which they could be lifted off. They were used in the boiling of the salt, and were necessary for making it, and essential to the existence of the salt works. It was held that by the words of the covenant the lessee was restrained from taking away the salt pans at the end of his term. For without regarding whether the pans were removable as mere chattels, as not being affixed to the freehold, the Court considered that inasmuch as they were a necessary and constituent part of salt works, they must be understood to be included under the general description of *works*, and to fall within the terms and meaning of the covenant, "to leave all and every the premises demised" (k).

Covenant to
yield up
premises,
except things
in nature of
machines or
implements.

The case of *Foley v. Addenbrooke* (l) deserves attention here, as it affords a further illustration of the effect of the covenants in a lease, upon the claim of a tenant in removing fixtures of which a general description only is found in the lease. The facts are very special, and may be collected from the case itself, where they are stated at great length, and the description of the fixtures in question particularly set forth. It was an action for the breach of

(k) In *Duke of Beaufort v. Bates*, 3 D. F. & J. 381, it was held that tram plates placed upon wooden and iron sleepers resting upon but not fast-

ened to the soil did not fall within a tenant's covenant to yield up at the end of the term all *works, ways, and roads*.

(l) 13 M. & W. 174.

the covenants in a lease of certain iron stone mines; by Chap. II. s. 8. which the lessee covenanted (*inter alia*) to erect a furnace, &c., and iron works on the premises, and to repair and yield up in repair the furnaces, fire engine, iron works, dwelling-houses, and all other erections, buildings, improvements, and alterations, to be thereafter erected, built, or set up, except the iron-work castings, railways, gins, whimseys, machines, and moveable implements and materials used in or about the said furnaces, fire engine, iron works and premises. In an action on this covenant the breach assigned was for not repairing and leaving in repair the furnaces, &c. To this breach it was pleaded (with other pleas), that every thing was left in repair other than and except the iron-work castings, and other matters which the defendant had a right to remove. It appeared that the lessee had built on the premises extensive iron works, consisting, amongst other things, of casting houses, a forge and mill, furnaces, blast or fire engines, boilers, gins, &c., houses, buildings, and sheds. It was held, that under the above covenant the tenant was entitled to remove whatever was in the nature of a machine or part of a machine, but not what was in the nature of building or support of building, although made of iron. And that applying this rule, the tenant was entitled to remove the blast steam or fire engines, cylinders, pipes, and apparatus connected therewith; furnaces fixed in brickwork; wrought-iron boilers resting on brickwork, and surrounded by flues and brickwork; boiler grates, consisting of bearers of cast-iron set in brickwork, with bars, doors, &c.; castings and iron work of the engines; puddling furnaces, mill furnaces; gasometer, and other fixed property specified in the case, and of the same nature with the steam or fire engines. On the other hand, the Court held that he was restrained by the lease from removing (besides buildings) brick pillars, or iron work substituted for brickwork, such as hoops, bearers, &c., belonging to the furnaces; cast-iron columns for sup-

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porting the buildings, &c.; such things not being in the nature of machines or implements (*m*).

When general words restrained to things *ejusdem generis*.

On the other hand, where a tenant covenanted to deliver up at the end of the term the demised premises "together with all locks, keys, bars, bolts, marble and other chimney-pieces, foot-pieces, slabs and other fixtures, and articles in the nature of fixtures, which shall at any time during the said term be fixed or fastened to the demised premises or be thereto belonging," it was held by the Court of Exchequer Chamber that as the words of the covenant referred only to such articles as are commonly called landlord's fixtures (*n*), the general words which followed must be limited to fixtures of the same kind, and that the tenant, therefore, was not debarred from removing tenant's fixtures (*o*). But it will be otherwise where the articles mentioned in a similar covenant include both landlord's and tenant's fixtures (*p*).

Substituted fixtures.

It follows from the cases that have been already referred to that a tenant may, by the terms of his covenant, debar himself from removing fixtures which he may have substituted during the term for those which he found upon the demised premises at its commencement. In such cases he cannot at the expiration of his term remove the substituted fixtures, although he restore the original ones to their places. Thus, in *Martyr v. Bradley* (*q*) a tenant took a lease of a water-mill together with two pair of mill stones, machines, gear works, &c., in or affixed to or about the mill; and covenanted to leave the same together with all locks, bolts, bars, and other fixtures, fastenings, and

Mill stones.

(*m*) There are other important points decided in this case, which are noticed *ante*, p. 124.

(*n*) *Ante*, p. 1.

(*o*) *Bishop v. Elliott*, 24 L. J., Ex. 229. And see *Dumergue v. Rumsey*, 33 L. J.,

Ex. 88; *Sumner v. Bromilow*, 34 L. J., Q. B. 130; and *ante*, p. 90, note (*f*).

(*p*) *Wilson v. Whateley*, 1 J. & H. 436.

(*q*) 9 Bing. 24. See also *Haslett v. Burt*, 18 C. B. 893.

improvements, which during the demise should be fixed, fastened, or set up, in, upon, or about the premises, in good plight and condition, reasonable use and wear only excepted. During the term, the tenant had substituted two new mill stones for two old ones which he found on the premises. The lower stone was rammed in and fixed with mortar; the upper one revolved on its axis. When he quitted the premises, he took away the new stones and left in their place those which he had found on entering. It was held by the Court of Common Pleas, that by the terms of the covenant, the tenant was precluded from taking away the new stones. For the words "improvements, fixed, fastened, or set up," comprehended alterations in the working part of the mill; and the stones were an improvement, and an essential part of the mill. The Court also thought that it made no difference that it had been proved that it was the general custom (*r*) for a tenant to remove such stones.

The same principle was also recognized in a case determined by the Vice-Chancellor of England (*s*). There a lessee of a mill and steam engine had covenanted to repair, "reasonable wear, &c., excepted." During the term the lessee had substituted a new steam engine of greater power in lieu of the one which was on the premises when the lease was granted. The Vice-Chancellor was of opinion, that the right of the lessee was to be determined by the covenant in the lease; that the substituted engine was subject to the stipulation in the lease as to the old engine; and that the lessee was not entitled to remove it.

Steam engine.

It was said by Parke, B., in a case already referred to (*t*), that under a covenant to deliver up the demised premises

Whether tenant bound to deliver up identical locks, keys, &c.

(*r*) As to custom, see *ante*, p. 66.

(*s*) *Sunderland v. Newton*, 3 Sim. 450.

(*t*) *Elliott v. Bishop*, 24 L. J., Ex. at p. 35. Compare *Wilson v. Whateley*, 1 J. & H. 436, 440. This would seem to

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with all locks, keys, bolts, bars, &c. the tenant is not required to deliver up the identical locks, keys, &c., for, if so, he would be prevented from having an improved lock or key; but that such a covenant would prevent the tenant removing the substituted locks, keys, &c. attached to the building at the end of the term.

Removal of things which may be restored at end of term.

It will be well to notice here the case of *Doe d. Burrell v. Davis* (*u*), where the tenant had covenanted to repair and keep in repair the demised premises during the term, and to deliver up the same at the end or sooner determination of the demise, together with all improvements, &c. and all dressers, shelves, pipes, &c. There was a proviso for re-entry by the lessor on breach of any of the covenants in the lease. During the term the tenant removed and sold certain fixtures which fell within the covenant, and thereupon the lessor brought an action of ejectment for forfeiture. At the trial before Talfourd, J., the jury found that all the articles mentioned were removable fixtures and might be restored before the end of the term. The learned judge then directed them that it was possible to remove fixtures which might be restored during the term, in such a way as to amount to a breach of the covenant to keep in repair; the jury thereupon further found that the fixtures in question were not removed in such a way as to amount to a non-repair, and a verdict was entered for the defendant with leave to the plaintiff to move to enter a verdict for him. The Court of Common Pleas refused to grant the plaintiff a rule to that effect, holding that the direction of the learned judge at the trial was correct. It will be seen that owing to the findings of the jury in this case, it was unnecessary for the Court to consider what would be the rights of the lessor on the determination of the term.

depend on the maxim "*de minimis non curat lex*," but it is obvious that cases might occur of articles of special

value in which the maxim might not be applicable.

(*u*) 15 Jur. 155.

All the authorities, therefore, concur in establishing that notwithstanding the property in question may have belonged to the tenant, and whether it is permanently fixed to the freehold or not, it may still become irremovable, if, by the interpretation of the contract between himself and his landlord, it appears to have been contemplated by them that it should not be taken away at the expiration of the term (*v*). In interpreting such contracts, however, regard must be had to the subject-matter of the demise (*w*), and a lease ought not to be construed so as to take away the ordinary legal rights of a tenant, unless such an intention is clearly apparent (*x*).

Chap. II. s. 6.

Result of
authorities.Construction
of contracts.

On the same principle, a tenant may be precluded from removing fixtures by an implied dereliction of the right to remove them, arising out of the nature of a transaction between himself and his landlord, although there may be no express covenant or agreement on the part of the tenant in respect of fixtures.

Alteration of
rights by new
agreement.

Thus, in *Fitzherbert v. Shaw* (*y*), the defendant had been holding certain premises from year to year since 1765. In 1787 they were purchased by the plaintiff, who having given the defendant notice to quit, afterwards brought an ejectment against him to obtain possession. In March, 1788 (while the action was pending), the parties entered

Fitzherbert v.
Shaw.

(*v*) It is obvious that where a tenant has entered into such a contract, an undertenant will be bound by it, although he may have stipulated with the mesne tenant for the removal of trade fixtures. And in such a case the Court will not imply a covenant on the part of the mesne tenant that he will prevent the superior landlord from interfering with the removal of the fixtures by

the undertenant. *Porter v. Drew*, 5 C. P. D. 143.

(*w*) *Doe d. Freeland v. Burt*, 1 T. R. at p. 703, per Ashurst, J.; *Bishop v. Elliott*, 24 L. J., Ex. at pp. 39, 232; *Bidder v. Trinidad Petroleum Co.*, 17 W. R. at p. 154, per Lord Romilly, M. R.

(*x*) *Duke of Beaufort v. Bates*, 3 D. F. & J. at p. 390, per Turner, L. J.

(*y*) 1 H. Bl. 258.

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*Heap v.
Barton.*

into an agreement that judgment should be signed for the plaintiff, but with a stay of execution till the Michaelmas following, till which time the defendant was to continue in possession. In this agreement no mention was made of any buildings or fixtures. Between the time of entering into the agreement and the ensuing Michaelmas, the defendant removed several things from the premises (s), which Gould, J., at Nisi Prius, considered would have been removable during the tenancy; but he thought that, by the agreement, the parties had made a new contract, which put an end to the term. And the Court of Common Pleas decided, that without entering into the general question as to the right to remove the articles as fixtures, the defendant was precluded from taking them away by the fair interpretation of the agreement; from which it must be implied, that he was to do no act in the meantime to alter the premises. In 1852, the same Court expressly followed this decision, placing a like construction on a similar agreement, under which judgment was allowed to go by default against the tenants (a).

Alteration of
rights by sub-
sequent
demise to
same tenant.

*Thresher v.
East London
Waterworks.*

From the cases of *Fitzherbert v. Shaw* and *Heap v. Barton*, and others already mentioned in this section, but particularly from an analogous one which followed the first-mentioned case of *Naylor v. Collinge* (b), and where the authority of that decision was approved by the Court of King's Bench, a further inference may be deduced, which may be mentioned in this place. The case referred to is that of *Thresher v. East London Waterworks Co.* (c); and from that decision it appears that a lessee would be restrained by a general covenant to repair, from pulling down an erection which he had made before the commencement of his lease, and during the time he held

(z) See these articles described, *ante*, p. 59.

(a) *Heap v. Barton*, 21 L. J., C. P. 153. And see *Deeble v. M'Mullen*, 8 Ir. C. L. R.

355; *Sharp v. Milligan*, 23 Beav. 419.

(b) *Ante*, p. 146.

(c) 2 B. & C. 608.

the premises under a previous tenancy (*d*). So that an erection made during a preceding lease, supposing it might have been removed whilst that lease continued, is no longer removable when the premises are conveyed to the same lessee by general words (as for instance, *land, premises, or buildings*), in a subsequent lease, although the latter contains only the common covenant to repair. It is not thought necessary to enter at large into the case, because it contains many complicated facts; but it virtually establishes the above proposition (*e*). Chap. II. s. 6.

Upon this point, the American case of *Watriss v. First National Bank of Cambridge* (*f*), may be usefully referred to. There a tenant, having a lease expiring on the 1st of January, 1871, accepted from his landlord in October, 1870, a lease for a further term to come into operation on the expiration of the first (*g*). The new lease contained a provision that the tenant should deliver up the premises on the determination of the second lease, *Watriss v. First National Bank.*

(*d*) The building in question was erected by an under-lessee of the tenant, which under-lessee, as against his immediate landlord, could not remove it. It is obvious, however, that this does not vary the principle of the case. By sect. 58 of the Agricultural Holdings Act, 1883, a tenant who has remained in his holding during a change of tenancy, is not to be deprived of his right to compensation by reason only that the improvements were made during the former tenancy. See the section, *post*, in Appendix (F.). There is, however, no similar provision as to the right of removing fixtures.

(*e*) It is evident that the Chief Judge in *Ex parte Lloyd*

(1 Mont. & Ayr. at p. 511), so understood this case, for he said, "The fixtures, therefore, forming a part of the premises let by the renewed demise, would have been no longer removable, but would for every purpose form a part of the freehold, according to the case of *Thresher v. East London Waterworks Co.*"

(*f*) 26 Am. Rep. 694. And see *Loughran v. Ross*, 6 Am. Rep. 173.

(*g*) The Court considered that the new lease took effect as if executed on the day on which it came into operation. There was, therefore, no surrender until the tenant occupied under the new lease.

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in as good order and condition as the same "*now are.*" The question for the determination of the Supreme Court of Massachusetts was, whether the acceptance of the new lease and occupation under it on the 1st of January, 1871, were equivalent to a surrender of the premises to the lessor on the expiration of the first term. For, if they did amount to a surrender, the Court thought it clear that the tenant could not afterwards recover trade fixtures annexed during the first term. After stating that it is clear from the cases that the right of a tenant in possession after the end of the term to remove fixtures within a reasonable time, rests on the fact that he is still, in contemplation of law, in occupation as tenant under the original lease; or, in the words of Parke, B., in *Mackintosh v. Trotter* (*h*), under what may be considered "an excrescence on the term," the judgment proceeds:—"But a very different question is presented when the same tenant continues in possession under a new lease containing different terms and conditions, making no reference to the old lease, reserving no rights to the lessee in fixtures annexed during the previous term and not removed before its expiration, and containing covenants to deliver up the premises at the end of the term in the same condition. This is not an extension of, or holding over under, an existing lease; it is the creation of a new tenancy. And it follows, that whatever was a part of the freehold when the lessee accepted and began his occupation under the new lease must be delivered up at the end of the term, and cannot be severed. . . . The occupation under the new lease is in effect a surrender of the premises to the landlord under the old" (*i*). In support of their decision, the Court referred to the above-mentioned cases of *Fitzherbert v. Shaw* and *Thresher v. East London Waterworks Co.* (*j*).

(*h*) *Ante*, p. 134.

(*i*) See *Lyon v. Reed*, 13 M. & W. 285, 305. And see

2 Sm. L. C. 884 *et seq.* (8th ed.).

(*j*) In the case of *Kerr v. Kingsbury* (33 Am. Rep. 362),

In the above case, it will be seen, the Court relied on the fact that the new tenancy was in no proper sense a renewal of the old one, and they laid stress on the provision contained in the new lease, that the tenant should deliver up the premises in as good condition as they were in at the commencement of the new tenancy. Notwithstanding this, it is thought that even in cases of what is commonly called *renewal* of leases, the same rule must apply. In such cases there is in reality the grant of a *new interest* in the premises to the tenant, although upon the same conditions as those under which he formerly held. All, therefore, which formed part of the demised premises at the expiration of the first term must, unless excluded by the agreement of the parties, have passed to the landlord as part of the reversion out of which the new term is granted to the tenant. If the view here taken is correct, it seems to follow that the tenant's right of removing fixtures will be lost, although the further tenancy may arise merely from his holding over, and paying rent after the expiration of his term; for he thereby becomes a tenant under a new tenancy from year to year (*k*).

Chap. II. s. 6.

Alteration of rights by renewal of term.

It is, of course, competent to the tenant to show that by the agreement under which he continues in possession of the premises, his right of removing fixtures annexed

Evidence to show that tenant's rights reserved.

the Supreme Court of Michigan came to a contrary decision, holding that, as no grounds of public policy require the removal of fixtures before the expiration of a term, when the tenant continues in possession under a new lease, the new lease ought not to be considered to include the fixtures as part of the demised premises, unless from the lease itself an under-

standing to that effect is clearly inferable. But it is submitted that the question does not depend upon considerations of public policy, but upon the established rule of law that fixtures during annexation are a part of the realty. See *ante*, p. 28.

(*k*) *Bishop v. Howard*, 2 B. & C. 100. And see *Hyatt v. Griffiths*, 17 Q. B. 505.

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during the first term was reserved, and that, consequently, they were excluded from the subject of demise under the new tenancy. But the onus of proving such an agreement would, it is submitted, be upon him. In *Thresher v. East London Waterworks Co.* (l), the Court of King's Bench said, that it might be questionable whether any matter *dehors* the lease could be alleged to prevent the covenant to repair contained in the new lease from attaching to the erection which was there in question. It seems, however, that extrinsic evidence of such an agreement between the landlord and tenant would be admissible upon the question parcel or no parcel, which is always one of fact (m).

Semble, right divested by any new agreement in which no mention of fixtures.

It may, perhaps, be thought upon a consideration of the foregoing decisions, that this general principle is deducible from them, viz., that where a tenant has an existing right to remove fixtures erected by him during his term, that right may be divested by any new agreement for the enjoyment of the land, in which there is no mention of the fixtures (n). It is right to add here,

(l) *Ante*, p. 156.

(m) *Doe d. Freeland v. Burt*, 1 T. R. 701, per Buller, J.; *Lyle v. Richards*, L. R., 1 H. L. 222; *Francis v. Hayward*, 22 Ch. D. 177. And see *post*, p. 279.

(n) *Semble*, a mere agreement for increase or abatement of rent under an existing term would not be such a new agreement for the enjoyment of land. It would be rather the confirmation of an existing tenancy with a variation of one of its terms. See *Donellan v. Read*, 3 B. & Ad. 899; *Clarke v. Moore*, 1 Jon. & Lat. 723, 729. And see *Crowley v. Vitty*, 7 Exch. 319. The principle mentioned in the text would probably apply

to a case, where an out-going tenant has agreed that when he quits possession he will leave his fixtures for an incoming tenant, who has taken a lease of the premises to commence at the expiration of the former tenant's interest. Here, if the landlord was not a party to the agreement, the question might arise how far the second tenant would be clothed with the rights of the former tenant. For the landlord might contend, that as the fixtures were not actually severed by the first tenant, they formed a part of the demise to the new tenant; and the latter would, therefore, be liable for waste if he removed them.

however, that in a very recent case (o) the Court of Appeal declined to give an opinion whether a tenant continuing in possession under a new or extended term retains his right of removing fixtures during such continued or continuous possession. Their Lordships' attention does not seem to have been directed to the authorities upon the subject, and as it was unnecessary for them to decide the point in the case before them, they said that they desired to be unfettered whenever it should arise for decision.

Chap. II. s. 6.

It has been decided that where a tenancy is determined by the death of the lessor, tenant of a particular estate, but the lessee continues in occupation, paying the same rent to the remainderman, the latter is not necessarily bound by special terms of the lease of which he has no knowledge. Thus, in *Oakley v. Monck* (p) a tenant for life had granted a lease containing a provision that the lessee should, at the expiration of the term, be paid by the lessor at a fair valuation for all fruit trees and shrubs then upon the demised premises (q). The term having expired, the lessee continued to hold as tenant at the same yearly rent, and, therefore, upon such terms of the original lease as were not inconsistent with a yearly tenancy; and presumably these terms included the above right in respect of fruit trees. On the death of the tenant for life, the lessee continued in possession, paying the same rent to the remainderman; but nothing passed between them as to

Unusual terms in lease, tenant continuing to hold under remainderman.

(o) *Ex parte Willoughby d'Eresby, In re Thomas*, 29 W. R. at p. 528. In *Pugh v. Arton* (L. R., 8 Eq. 626), where a lease was determined by forfeiture, but the tenant was permitted to continue in occupation as a yearly tenant, the point does not seem to have been argued, and Malins, V.-C., expressed no opinion

on it.

(p) L. R., 1 Ex. 159. Compare *Wyatt v. Cole*, 36 L. T. 613.

(q) Blackburn, J., expressed an opinion that this stipulation did not deprive the tenant of his right of removing the fruit trees and shrubs, to which he was entitled as a nurseryman. *Ante*, p. 100.

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the terms upon which the occupation was to continue, and it was found as a fact that the remainderman was ignorant of the above provision in the lease. The Court of Exchequer Chamber held, that as the tenant became tenant from year to year, only those terms were to be assumed as existing between the parties, which were according to the use and the custom of the country; but not the special right in respect of trees and shrubs, which was not in fact known to the remainderman, and which he was not bound to know.

Alteration of
tenant's
rights by
terms of his
contract
generally.

The principle laid down in the case of *Naylor v. Collinge* and the other decisions mentioned in this section, is applicable generally to the law of fixtures, as it relates to landlord and tenant. And consequently a tenant may, by the special terms of his agreement, not only vary his rights as to the description of articles he is entitled to remove, but may enlarge the time for their removal, and subject himself to greater restrictions, or secure to himself greater privileges in the ultimate disposition of them, than would attach to him merely as tenant (*q*). Thus, where a tenant has, by the terms of his lease, the privilege of selling his fixtures by valuation to an incoming tenant, it is conceived that, in conformity with the principle laid down in *Beaty v. Gibbons* (*r*), he would have a right of *onstand* on the premises, and that his interest in the fixtures would not determine at the expiration of his lease. Again, where a lease provides that, in the event of forfeiture for bankruptcy, the landlord is to have certain trade fixtures, thus implying that his rights are to be limited to those particular fixtures, a trustee in bankruptcy of the tenant will be entitled to a reasonable time after the expiration of the term, within which to remove

(*q*) See *Burn v. Miller*, 4 Taunt. 745; *Fairburn v. Eastwood*, 6 M. & W. 679, as explained in 2 Smith's Leading

Cases (8th ed.), p. 204.

(*r*) 16 East, 116. And see *Cornish v. Stubbs*, L. R., 5 C. P. 334.

fixtures the right to which is in him (s). So, also, where a lease provides that a tenant may remove fixtures at the end or sooner determination of the term, and the landlord re-enters for breach of covenant, the tenant will be entitled to a reasonable time for the removal of fixtures, to be calculated from the time of his receiving notice of the landlord's intention to re-enter (t). We have seen, however, that in these cases the tenant would not, in the absence of such express provisions, have had any such right (u). Indeed, a tenant may, by the terms of his holding, acquire an almost unlimited right to remove things which he affixes to the freehold. For if a lease or demise for years is made with an express clause "without impeachment of waste," this condition will have the same effect as where it is inserted in a conveyance of an estate for life (v). By entering into special conditions of this nature, the parties entirely change the situation in which they would stand towards each other from the mere relation of landlord and tenant. And in all these cases, the claims in controversy cannot be determined by the law of fixtures, but resolve themselves into questions of construction; in which the only point for determination is, whether the property in dispute falls within the terms of the agreement, exception, proviso, &c. (w).

It might be matter for consideration, whether the established custom of a particular district in respect of Custom, whether of the same effect as contract.

(s) *Stansfield v. Mayor, &c. of Portsmouth*, 27 L. J., C. P. 124.

(t) *Sumner v. Bromilow*, 11 Jur., N. S. 481; S. C. 34 L. J., Q. B. 130.

(u) *Pugh v. Arton*, L. R., 8 Eq. 626. And see *ante*, p. 139 *et seq.*

(v) 1 Cru. Dig. tit. 8, ch. 2, § 12. And see *Poole's case*, 1 Salk. at p. 369. As to the effect of the clause "without

"impeachment of waste," in a conveyance of a life-estate, see *post*, p. 188.

(w) Sometimes clauses are inserted in leases, merely for the sake of avoiding disputes. It is not unusual to have a condition in leases of mills, collieries, &c., that the tenant shall be at liberty to remove all the machinery and erections he puts up. See, too, *post*, p. 291, note (g).

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fixtures would not operate in the same manner as a contract which specifically relates to them. In claims between landlord and tenant, it has often been determined that custom has this effect, when not opposed to the express words of an agreement (x). But it does not appear that this doctrine has been applied to the case of fixtures. It would be material to ascertain how far such a principle would apply. For the decisions are not very explicit as to the degree of weight to be attached to evidence of custom in cases of fixtures; and outgoing and incoming tenants are much in the habit of viewing their own rights with reference to the practice of antecedent tenants, and the usage of the particular neighbourhood. And where a tenant has paid for an article by valuation on entering upon his tenancy, he has a right to presume that he shall be valued out as he was valued in; particularly if such a practice has prevailed during a succession of tenancies, and is known to be the common custom of the country.

Application
of amount of
insurance
upon fixtures
under 14
Geo. 3, c. 78,
s. 83.

Before concluding this section it will be well to notice the case of *Ex parte Goreley* (y), decided by Lord Westbury, C., in 1864, the facts of which were somewhat peculiar. There a lessee had covenanted to deliver up the demised premises "with the fixtures, improvements and other additions, whether for the purpose of trade or otherwise, at the expiration or sooner determination of the term." The lease also contained covenants on the part of the lessee to insure the premises against fire, and a proviso for re-entry by the lessor in the event of the lessee's bankruptcy. The lessee duly insured the buildings by one policy, and the trade fixtures by another. Shortly afterwards a fire took place by which the premises and

(x) On this point, see, generally, the notes to *Wigglesworth v. Dallison*, 1 Sm. L. C. (8th ed.), p. 194, and *ante*, p. 67. See also *Martyr*

v. Bradley, 9 Bing. at p. 29, *ante*, p. 153.

(y) 34 L. J., Bkcy. 1. Compare *Doe d. Burrell v. Davis*, *ante*, p. 154.

fixtures were totally destroyed, and subsequently to this the lessee became bankrupt. Thereupon the lessor and the lessee's mortgagees requested the insurance company to expend the insurance money in rebuilding and reinstating the buildings and trade fixtures, under the provisions of 14 Geo. 3, c. 78, s. 83. It was held by Lord Westbury, that the amount of the policy upon the buildings ought to be so expended in rebuilding the premises; but that the application must fail as regards the money secured by the policy upon the trade fixtures. The grounds of his Lordship's decision upon the latter point appear to have been, that the lessee's covenant to deliver up fixtures related only to those which might be found upon the premises upon the determination of the term; and that as the term was subsisting at the time of the fire and the destruction of the fixtures, they did not then form part of the freehold, in the sense of being an integral part of the buildings, and did not, therefore, fall within the words "houses or other buildings" in the above section. The inference which has been generally deduced from the above decision seems to be that no fixtures removable by a tenant would fall within the provisions of 14 Geo. 3, c. 78, s. 83. In this view of the case, however, it is hard to reconcile the decision with the general rule that until severance *all* fixtures form a part of the freehold, and are, therefore, comprised in the general words "land or buildings" (z).

(z) *Ante*, p. 28, and *post*, p. 274. For a summary of rules relating to fixtures between landlord and tenant, see Appendix (B).

CHAPTER III.

OF THE RIGHT TO FIXTURES BETWEEN TENANTS FOR LIFE
AND IN TAIL, OR THEIR PERSONAL REPRESENTATIVES,
AND THE REMAINDERMAN AND REVERSIONER.

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SECTION I.

Of the Right of the Personal Representatives of Tenant for Life or in Tail, in respect of Fixtures put up for Trade, or for Trade combined with other Objects.

Part I.

QUESTIONS respecting the right to fixtures have arisen between another class of persons, viz., between the personal representatives of tenant for life, or in tail, and the remainderman or reversioner. On these occasions, it is insisted on the one hand, that when personal chattels have been annexed to the freehold by the tenant for life or in tail, they become part of the inheritance, and, in consequence, pass to the succeeding owner of the land. Whilst on the other side it is contended, that such annexations continue in the nature of chattels, and are to be deemed a part of the personal estate of the deceased tenant; or, to speak more correctly, that his executors are entitled

to sever them from the freehold, and to reduce them to a state of personalty in increase of assets (a). Chap. III. s. 1.

The relative interests of these parties, viz., the personal representatives of tenant for life or in tail, and the remainderman or reversioner, in respect of things which have been annexed to the freehold during the particular estate, become now the subject of consideration. It does not appear that questions of this nature were presented to the Courts at a very early period. Indeed up to the present time there are only three cases to be found in the reports, in which the rights of the personal representatives of tenant for life or in tail have been in controversy (b). Two of these cases, however, are often referred to as leading decisions upon the doctrine of fixtures, and as such they have already been noticed in the course of this work, on more than one occasion.

Fixtures put up by tenants for life, or in tail.

The first is the case of *Laulton v. Laulton*, before Lord Chancellor Hardwicke (c). It was determined in this case, that a fire engine (or steam-engine), erected in a colliery by a tenant for life, should be considered personalty, and go as assets to his executor, and that the remainderman should not take it as part of the real estate. The nature of this erection has already been described in a preceding chapter (d).

Steam-engines in collieries, personal estate.

Lord Hardwicke, in delivering his judgment in this case, observed, "Now it does appear in evidence that, in its own nature, it (*i. e.* the fire-engine) is a personal movable chattel, taken either in part or in gross, before it is put up. But then it has been insisted, that fixing

Judgment of Lord Hardwicke in *Laulton v. Laulton*.

(a) As to what constitutes annexation, see *ante*, Chap. I. p. 6 *et seq.*

(b) Viz. *Laulton v. Laulton*, 3 Atk. 13; *Lord Dudley v. Lord Warde*, Amb. 113; and

D'Eyncourt v. Gregory, L. R., 3 Eq. 382. The last-mentioned case is referred to at length, *post*, p. 180.

(c) *Supra*.

(d) *Ante*, pp. 51, 55.

Part I.

Furnaces, &c.
in brew-
houses.

“ it, in order to make it work, is properly an annexation
 “ to the freehold. To be sure, in the old cases, they go a
 “ great way upon the annexation to the freehold ; and, so
 “ long ago as Henry the Seventh’s time, the Courts of law
 “ construed even a copper and furnaces to be part of the
 “ freehold. Since that time, the general ground the Courts
 “ have gone upon, of relaxing this strict construction of
 “ law, is, that it is for the benefit of the publick to en-
 “ courage tenants for life to do what is advantageous to the
 “ estate during their term. . . . It is true, the old rules of
 “ law have indeed been relaxed, chiefly between landlord
 “ and tenant, and not so frequently between an ancestor
 “ and heir-at-law, or tenant for life and remainderman.
 “ But, even in these cases, it does admit the consideration
 “ of publick conveniency for determining the question. . . .
 “ One reason that weighs with me is, its being a mixed
 “ case, between enjoying the profits of the land and carry-
 “ ing on a species of trade ; and considering it in this light,
 “ it comes very near the instances, in brew-houses, &c. of
 “ furnaces and coppers.”

Lord Hardwicke then proceeds to point out the analogy of the case of landlord and tenant, and says that, in the reason of the thing, the situation of tenant for life comes near to that of a common tenant, where the good of the public is the material consideration. And he remarks, that the indulgence resembles, in its principle, that of emblements, where the chief consideration is the benefit of the kingdom (*e*). He thus concludes his judgment: “ It
 “ is very well known that little profit can be made of coal
 “ mines without this engine ; and tenants for lives would
 “ be discouraged in erecting them, if they must go from
 “ their representatives to a remote remainderman, when
 “ the tenant for life might possibly die the next day after
 “ the engine is set up. These reasons of publick benefit

(*e*) As to emblements, see *post*, p. 265.

“ and convenience weigh greatly with me, and are a principal ingredient in my present opinion.” The decree, therefore, was, that the engine should go for the increase of assets in the hands of the executor. Chap. III. s. 1.

It may perhaps deserve to be mentioned, that in this case the application to the Court was made on behalf of a creditor of the deceased tenant for life. Upon this Lord Hardwicke observed, that the Court could not construe the fund for assets further than the law allowed, but would do it to the utmost they could in favour of creditors. On a subsequent occasion, however, he declared that this circumstance made no difference in the nature of the question (*f*). Creditors of deceased tenant for life.

The next case is that of *Lord Dudley v. Lord Warde* (*g*). It came before Lord Hardwicke a few years after the former decision, and is similar to it in almost every respect. It was a bill by the executor of Lord Dudley, who was tenant for life or in tail (it did not appear which), against the defendant, who was the remainderman, to have certain fire-engines, erected in a colliery, delivered up as part of the personal estate of Lord Dudley. Lord Hardwicke said that the question was, whether such fire-engines erected by a particular tenant, or by tenant in tail, were to be considered as part of the owner's real or personal estate. Judgment of Lord Hardwicke in *Lord Dudley v. Lord Warde*.

“ The case,” he observes, “ being between executor of tenant for life (or) in tail, and a remainderman, is not quite so strong as between landlord and tenant, yet the same reason governs it, if tenant for life erects such an engine.”

Referring to his decision in *Lawton v. Lawton* he says, “ If it is so in the case of a tenant for life, query, how it would be in case of tenant in tail? Tenant in tail has but a particular estate, though somewhat higher than

(*f*) In *Lord Dudley v.* (*g*) Amb. 113.
Lord Warde, infra.

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“tenant for life. In the reason of the thing there is no material difference; the determinations have been from consideration of the benefit of trade. A colliery is not only an enjoyment of the estate, but in part carrying on a trade. The reason of emblements going to the executor of a particular tenant holds here, to encourage agriculture. Suppose a man of indifferent health, he would not erect such an engine, at a vast expence, unless it would go to his family.” The decree, therefore, was, that the fire-engine, erected by the testator (*h*), should go as assets to his executor.

Cider-mills.

In the determination of each of these cases, Lord Hardwicke expressly declared that his judgment was partly founded on the authority of the case of the cider-mill decided by Comyns, C. B. This decision has been already referred to (*i*); and, assuming it to be a valid authority, the inference from it would be that a cider-mill let into the ground may be deemed part of the personal estate of a tenant for life or in tail.

Relaxation of rule between such persons generally recognized.

The doctrine laid down in these cases of *Larion v. Larion* and *Lord Dudley v. Lord Warde*, has been recognized and confirmed by many subsequent authorities. Thus, in the case of *Larion v. Salmon* (*j*), it was said by Lord Mansfield, “There has been also a relaxation in another species of cases, between tenant for life and remainderman, if the former has been at any expense for the benefit of the estate, as by erecting a fire-engine, or any thing else, by which it may be improved; in such a case it has been determined that the fire-engine should go to the executor on a principle of public convenience, being an encouragement to lay out money in improving the estate,

(*h*) The bill was dismissed as to three of the engines erected by a predecessor in title of the testator.

(*i*) See *ante*, p. 57, and *post*, p. 229.

(*j*) 1 H. Bl. 260, *in notis*.

“ which the tenant would not otherwise be disposed to do.” Chap. III. s. 1.

In like manner, Lord Kenyon speaks of an exception having been allowed in favour of the personal estate of tenants for life or in tail (*k*). And in *Elwes v. Maw* (*l*), Lord Ellenborough alludes to this exception, as also does Lord O’Hagan in a modern case in the House of Lords (*m*).

In examining these decisions, it will have occurred to the reader that there are two important circumstances to be noticed in them.—First, that the erections in dispute were held to be in the nature of personal estate, on account of their relation to trade.—Secondly, that they were put up for the purpose of enjoying the profits of land, as well as for the object of trade. Lord Hardwicke compared the cases before him to the familiar instances in which the right of removal had been allowed to common tenants on the particular ground of trade. And he says that a colliery is not only an enjoyment of the estate, but in part carrying on a trade (*n*). And further, he calls it a mixed case, between enjoying the profits of land and carrying on a species of trade. This is also the view which Lord Ellenborough takes of these cases (*o*).

Nature of
privileged
articles.

(*k*) *Penton v. Robart*, 2 East, at p. 91.

(*l*) 3 East, at p. 51.

(*m*) *Bain v. Brand*, 1 App. Cas. at p. 776. And see Bul. N. P. p. 34; *Whitehead v. Bennett*, 27 L.J., Ch. at p. 475; *Climie v. Wood*, L. R., 3 Ex. at p. 260; *Fisher v. Dixon*, 12 Cl. & F. at p. 328, per Lord Cottenham.

(*n*) The working of mines and collieries is considered in equity as a species of trade. See *Jesus College v. Bloom*, 3 Atk. at p. 263; *S. C. Amb.* at p. 55; *Hanson v. Gardiner*, 7 Ves. at p. 308; *Jeffreys v. Smith*, 1 Jac. & W. at p. 302.

(*o*) *Elwes v. Maw*, 3 East, at p. 54. As regards agricultural fixtures, Lord Ellenborough remarks—“No adjudged case has yet gone the length of establishing that buildings subservient to purposes of agriculture as distinguished from those of trade have been removable by the executor of a tenant for life.” (*Id.* at p. 53.) As to the rights in respect of such fixtures of representatives of tenants for lives under contracts of tenancy, see the Agricultural Holdings Act, 1883, *ante*, pp. 89 *et seq.* “Hops reared on ancient stocks

Part I.

Executors entitled to trade fixtures, and to fixtures for a mixed purpose.

It appears, therefore, from these authorities, that there are two classes of fixtures which form part of the personal estate of a tenant for life or in tail, and which are excepted out of the general rule in favour of the inheritance, on the ground of public benefit and convenience (*p*). These two classes of fixtures correspond, in respect of their total or partial relation to trade, to those which have been treated of in the preceding chapter of this work, as removable between landlord and tenant. The general nature of such erections has been already explained; and it will not therefore be necessary to enter into a more particular account of them on the present occasion. It will be sufficient to refer the reader to the first and third sections of the second chapter (*q*); in the former of which, cases of trade fixtures in general, have been investigated; and in the latter, those mixed cases in which trade and the profits of land are combined.

Extent of the executor's privilege;

Considering the few occasions on which the claims of tenant for life or in tail have come before the Courts, it is almost impossible to point out how far the construction, magnitude, and mode of annexation of an article may affect the right of the executor to take it as part of the personal estate. An attentive examination of the grounds of decision in the two cases above cited, *Lawton v. Lawton*,

“shall go to executor of tenant for life, and not to the remainderman; for the poles, the hills, and the dung whereof the product is made, are the proper chattels of tenant for life.” Gilbert on Evidence, p. 216.

(*p*) Lord Ellenborough treats these exceptions as resting on the ground that trade is a matter of a *personal* nature; and, therefore, whatever is accessory to trade ought itself to

be deemed personalty. But see *ante*, p. 53. It should be noticed that Lord Hardwicke speaks in his judgments of the encouragement to be afforded to tenants for life, &c. in the general improvement of their estates. See *ante*, p. 52. And see *per* Lord Mansfield, in *Lawton v. Salmon*, *ante*, p. 170; *per* Lord O'Hagan in *Bain v. Brand*, 1 App. Cas. at p. 776.

(*q*) *Ante*, pp. 44, 97.

and *Lord Dudley v. Lord Warde*, will afford the best criterion for determining these questions (r). Chap. III. s. 1.

And in the first place it is to be observed, that in the application of the general principle as recognised in those cases, the particular state of the facts was much relied upon by the Court. For, although the consideration of trade, as conducing to the public benefit, was the substantial ground upon which the fire-engines were deemed personalty, yet Lord Hardwicke mentioned several other reasons in support of the executor's claim. Thus he adverts to the nature of the engines, as being moveable chattels in gross or in part before they were put up; and he compares them in this respect to the ordinary utensils of a brewhouse. Again, in answer to an objection as to the injury the inheritance would sustain in being deprived of the erections, he relies on the circumstance that the colliery could be enjoyed without them; so that it was only a question of *maius* and *minus*, whether it was more or less convenient for the collieries. He admits, also, that it is a general maxim, that the principal thing shall not be destroyed by taking away the accessory; and says that it did not affect the question before him, because the engines were the principal, and the walls and sheds over them the accessories (s). Lord Hardwicke, therefore, appears to have considered, that if the removal of the erections would have occasioned any substantial damage to the estate, or if they had been so far essential to the enjoyment of the land, that the inheritance could not have subsisted without them, the executor would not have been entitled to them, but that they must have gone to the remainderman as parcel of the freehold.

How affected
by the con-
struction, &c.
of the article;

By the injury
to the inherit-
ance.

(r) And see *D'Eyncourt v. Gregory*, L. R., 3 Eq. 382, *post*, p. 180.

(s) It had been objected in argument, that as the fire-

engines were annexed to certain sheds, the sheds ought not to be injured by taking away the accessorial engines. See *ante*, p. 63.

Part I.

Analogy of
decisions be-
tween other
parties.

In the next place it may be observed, that in determining the cases under consideration, the Court took notice of the analogy of corresponding claims which had been the subject of discussion between other parties. And these were supposed to furnish a criterion for the decision of like questions arising between tenants for life, &c., and those in remainder. In many instances this analogy would doubtless afford a safe mode of determining whether an article is to be deemed part of the real or the personal estate. But it must be borne in mind that in resolving questions of fixtures according to this method, it is very necessary to attend to the distinction which is supposed to exist, as to the degree of favour with which the law regards the claims of some individuals over those of others. Frequent allusion has been made to this distinction in the course of the work (*t*). And as it appears that the claims now under consideration have been contrasted, on the one hand, with those of the executors of tenants in fee, and on the other, with those of a common tenant for years, the present seems a convenient opportunity for noticing the opinions that are entertained upon this subject.

Analogy of
decisions be-
tween heir and
executor.

There is no doubt, that the personal representatives of tenant for life or in tail would have at least the same privilege in removing fixtures against the remainderman or reversioner, that the personal representatives of the deceased owner in fee have against the heir. For in the case of executor and heir, the rule is said to obtain with the most rigour in favour of the real estate; and the case of tenant for life or in tail has been called an *intermediate* one, between that of heir and executor, and that of landlord and tenant. Accordingly, it seems to be generally understood, that any determination in favour of an executor's claim to remove fixtures against an heir, will

(*t*) See *ante*, p. 50.

support a similar claim between whatever parties it may Chap. III. s. 1. arise.

With respect, however, to inferences to be drawn from decisions in favour of a tenant for years, it is certainly a remark often met with in the judgments of the Courts, that questions relating to fixtures between the representatives of tenants for life or in tail and the remainderman, are to be construed less liberally than in the case of a common tenant and his landlord (*u*). There does not, however, appear to be any case, the determination of which has proceeded upon a known or recognized distinction between these parties. For it cannot, upon authority, be affirmed of any specific article, that it is removable as between tenant and landlord, but that it is *not* removable as between tenant for life and the remainderman. Lord Hardwicke seems to treat the two classes much in the same light, and considers their claims to be founded on similar reasons. And, although he says that the case of a tenant for life is not quite so strong as that of a common tenant, yet many of his arguments are drawn from the close analogy between them. In like manner Lord Mansfield appears to consider that the rule in respect of trade holds equally in the one case as in the other. And even in *Elwes v. Maw*, where the distinction is most pointedly laid down, the explanation which Lord Ellenborough gives of the leading decisions relating to fixtures, proceeds upon a principle that is alike applicable to every description of claimants. However, as this distinction has been so often noticed by the highest authorities, it would not be safe to disregard it in practice. And this general observation may be offered on the subject:—that, although every thing which belongs to the representative of a tenant for life or in tail, on the ground of its relation to trade, may be considered *à fortiori*

Analogy of
decisions be-
tween land-
lord and
tenant.

(*u*) *Penton v. Robart*, 2 East, at p. 91; *Elwes v. Maw*, 3 East, at p. 51; *ante*, p. 50.

Part I.

removable by a tenant against his landlord, a decision between these latter parties must not be relied upon as forming a conclusive ground of determination, where the claims of the former individuals are in question. Nevertheless, from the analogy which prevails between the two classes, it will always be found useful, in determining the rights of tenant for life or in tail, to consult any corresponding cases that have been decided between a common tenant and his landlord.

Particular
classes, why
favoured.

There does not appear to be any reason assigned in the judgments of the Courts, why the general rule of law should be construed most strictly in the case of heir and executor, and most liberally in the case of a common tenant. Perhaps, in addition to the known partiality of the law towards the interests of the heir, the reason may have been, that the Courts considered that it was not equally necessary to relax the general rule in respect of each description of claimants; and that the objects of public policy might be attained by a slighter deviation from the ancient strictness where one class of individuals was concerned, than in the case of others. For, as there is no community of interests in respect of fixtures between a tenant and his landlord, the tenant would generally be deterred from making expensive improvements for the benefit of his trade, if he were compelled to leave them at the end of his term. Whereas the interest of a tenant for life is often (as in family settlements) connected intimately with that of the remainderman. And in the case of a tenant in fee, the question is merely one of real or personal assets; and whether the property after his death is transferred to his real or his personal representative, is a consideration which probably would not at all influence him in making annexations to his freehold (v).

(v) See *per* Lord Cockburn in *Dixon v. Fisher*, 5 D. at p. 797; and see the judgments of Lords, 12 Cl. & F. 312 (*post*, p. 228); *Bain v. Brand*, 1 App. Cas. 762, 777.

The practical inference to be deduced from the observations in the foregoing pages is, that in ascertaining whether a particular article set up in relation to trade, forms part of the personal estate of tenant for life or in tail, the first inquiry will be, whether it is governed by the cases of the fire-engines (*w*). The analogy of the different cases between landlord and tenant may next be resorted to; with that caution, however, which, it has been seen, is necessary on such occasions. In every instance, the general principles of trade fixtures, as they apply to each class of individuals, must be borne in mind. And, lastly, regard must be paid to all those circumstances arising out of each particular case, which have been particularly alluded to in the concluding part of the first section of the preceding chapter (*x*). For, from Lord Hardwicke's observations upon this subject, it will appear that, besides other considerations, the question whether an article is part of the real or the personal assets may be materially affected by the nature and construction of the article, its value to the inheritance, and the injury its removal will cause to the estate.

Chap. III. s. 1.

General observations.

It is, indeed, not unreasonable to expect that, at the present day, a decision of the Court would carry the relaxation in favour of the personal estate further than to the removal of mere machinery, like the fire-engines

(*w*) If the decision of Comyns, C. B., in the *cider mill case*, could be regarded as a valid decision it would, of course, be an *à fortiori* authority in favour of the personal representatives of tenants for life or in tail (see *ante*, pp. 170, 174); but this decision cannot be considered as binding at the present day. See *post*, pp. 229, 233.

(*x*) *Ante*, p. 65 *et seq.*, and

post, p. 239. It is apprehended that evidence of a mere usage, as distinguished from a custom properly so called, would be inadmissible in questions between the personal representatives of tenants for life or in tail and the remainderman or reversioner; for, as has been already explained, the only effect of such evidence is to add an implied term to contracts. *Ante*, p. 68.

Part I.

before Lord Hardwicke. For, in the time of Lord Hardwicke, *Poole's case* (y) was the only reported authority which expressly recognized the exception in respect of trade fixtures. Whereas, since that period, the general principle of the exception has been gradually extended, and has been acted upon by the Courts with increasing liberality (z).

(y) 1 Salk. 368.

(z) It is presumed that the executor will have a reasonable time for the removal of fixtures after the death of his testator. See Yr. Bk. 22 Edw. 4, p. 27; *Stodden v. Harvey*,

Cro. Jac. 204. A question, however, might arise, whether if he should be guilty of neglect in taking them away, it would not amount to an abandonment of the right to have them.

SECTION II.

Of the Right of the Personal Representatives of Tenant for Life or in Tail, in respect of Fixtures put up for Ornament or Convenience.

In the preceding section it was observed, that there are only three direct authorities relating to fixtures put up by tenants for life, or tenants in tail; viz., those of *Lawton v. Lawton* (a), *Lord Dudley v. Lord Warde* (b), and *D'Eyncourt v. Gregory* (c). Of these, it has been shown that the two former were decided upon the ground of an exception in favour of trade. But besides trade erections, there are also articles of another description, which, though fixed to the freehold, may be considered in the nature of personal estate; viz., matters of ornament and convenience. It is as to such articles that the last-mentioned case is an authority.

Chap. III. s. 2.

The right of the personal representative of tenant for life or in tail to take away matters of ornament or convenience, may be inferred from the circumstance that fixtures of this description have been allowed to form part of the personal estate of a deceased tenant in fee. This inference is warranted by the rule laid down in the preceding section (d). And it will be recollected, that a similar mode of reasoning was used in investigating the claims of a common tenant against his landlord, where, perhaps, the analogy is not quite so direct as in the present case.

Matters of ornament, &c., personal estate.

It will not, however, be found, that the claims of the personal representatives of tenants for life or in tail, in matters of ornament, &c., can be carried to any great

Extent of privilege.

(a) 3 Atk. 13.

(b) Amb. 113.

(c) L. R., 3 Eq. 382.

(d) *Ante*, p. 174.

Part I.

extent upon the authority of decisions between heir and executor. For, on referring to the cases cited hereafter (*e*), it appears that the articles which an executor of a tenant in fee has been held entitled to take, as part of the personal estate, consist merely of hangings, glasses, and tapestry nailed to the walls of a house, furnaces, grates, iron backs to chimneys, and such like (*f*). These instances, therefore, only establish an indulgence extending to things which subsist as complete chattels in themselves, and which, having been put up as mere ornamental furniture, or for temporary domestic convenience, are not united to the fabric of the house by any permanent or substantial annexation (*g*).

*D'Eyncourt v.
Gregory.*

The case of *D'Eyncourt v. Gregory* (*h*) was decided by Lord Romilly, M. R., in 1866, and it may be considered for all purposes a direct authority upon the rights of the personal representative of a tenant for life against the remainderman. The facts were shortly as follows:—A. was tenant for life of Whiteacre under a settlement, and he was also tenant in fee of Blackacre. By his will he devised Blackacre in strict settlement to the families entitled to Whiteacre under the settlement of that property, and he bequeathed to the trustees of his will (*inter alia*) all his furniture, tapestry, marbles, statues, and pictures, with their frames and glasses, which should be in or about the manor house on Whiteacre, and of which he had power to dispose, and directed that his trustees should stand possessed thereof, upon trust that the same might be held and enjoyed as heirlooms by the person or persons who should, by virtue of his will, be from time to time entitled to Blackacre. The will also contained a shifting clause as to Blackacre and the articles thereby made heirlooms. A.

(*e*) *Post*, p. 243.

(*f*) See the cases of *Squier v. Mayer*, Freeman's Cas. in Chy. p. 249; *Harvey v. Har-*

vey, 2 Str. 1141; and *Beck v. Rebow*, 1 P. Wms. 94.

(*g*) *Ante*, Ch. I. p. 8.

(*h*) L. R., 3 Eq. 382.

died in 1854, whereupon B. became tenant for life of Blackacre under the will of A., and also of Whiteacre under the settlement of that property. On the death of B., C. became tenant for life of Blackacre, and tenant in tail in possession of Whiteacre. In 1861, and during the possession of C., the shifting clause in the will of A. took effect in favour of D. Thereupon the question arose as to what were the articles contained in the gift of heirlooms in the will of A., which he had power to dispose of, and which would therefore, by the operation of the shifting clause, pass to D. together with Blackacre. It will be seen, therefore, that, in point of fact, the conflict was between the personal representative of A., the tenant for life, and C., the remainderman.

The principal articles claimed by C. as fixtures were as follows:—Tapestries in the gallery and another room of the mansion house. These were stretched on wood and attached by screws or nails to plugs of wood inserted in the brick wall. Painted wood mouldings had been placed round the face of the tapestry, flush with the wood wainscoting or panelling of the room;—A picture fixed in a panel in a similar way to the tapestries, but having a gilded frame placed on the mouldings, and attached thereto and to the wainscoting of the room by screws or nails;—Carved and gilt frames filled with satin, occupying the side of a room, and placed against the flush face of the wall to which they were attached with nails or screws;—A chimney-glass in an ornamental frame and an oil painting surmounting it, which were placed against the flush face of the wall and attached with nails or screws as an ordinary looking-glass would be fixed;—Kneeling figures and marble vases which rested upon pedestals, their great weight rendering unnecessary the use of mortar or cement for the purpose of attaching them thereto;—Stone figures of lions at the head of a flight of steps in the garden. These also simply rested on stone pillars, their own weight

Tapestries on frames screwed to wall.

Picture in panel.

Frames filled with satin.

Chimney-glass.

Figures and vases upon pedestals.

Stone lions.

Part I.

**Marble
garden seats.**

being sufficient to prevent them being displaced;—Ornamental garden seats, formed of marble slabs resting on, but not attached to, stone uprights sunk a short distance into the soil. It was stated that all these articles could be removed without material damage.

**Judgment of
Lord Romilly,
M. R.**

Lord Romilly said :—“It is clear that the testator” (viz., A.) “could not have disposed of paper affixed to the walls, nor, if he had used silk instead of paper for lining the walls, could he, in my opinion, have removed the silk. So, if the testator had covered the walls of the house with panelling, he could not, in my opinion, have removed the panelling, and have left the walls bare. If he caused them to be painted in fresco, he could not have removed the paintings, and I think if he had caused the panels to be painted he could not have removed the painting any more than if he had put in panels already painted, and fixed them close to the wall. In all these cases I think they must be considered to be fixtures not removable by the tenant for life. . . . Both the painting” (viz., the picture in the panel) “and the tapestries could be removed unquestionably in this sense, that they could be taken down, and the space left or filled with satin, and so likewise the satin in the frames could be taken down, and the gaps replaced by paper, in the same manner as the tapestry might be replaced with satin; whereas the paper, being stuck close to the wall, could not be removed; but, in my opinion, in all these cases, whether it is the paper, or the satin, or the panels, or the tapestry, they are all part of the wall itself, and they are fixtures not to be removed. In all these cases the question is, not whether the thing itself is easily removable, but whether it is essentially a part of the building itself from which it is proposed to remove it, as in the familiar instance of the grinding stone of a flour mill, which is easily removable, but which is nevertheless a part of the mill itself, and goes to the heir,

“ and not to the legal personal representative. The chimney-
 “ glass, and the ornamental frame, and the oil painting
 “ surmounting it, appear to me to be no part of the house
 “ itself, or of the wall itself, but to be merely ornaments
 “ attached to it, which the testator might have removed.
 “ The carved and gilt frames filled with blue and white
 “ satin, as I understand the evidence, fall exactly in the
 “ same category as the tapestry, and are, in fact, instead
 “ of what is usually paper, a covering of the walls, and
 “ form part of the walls themselves.”

Chap. III. s. 2.

With respect to the kneeling figures, marble vases, stone lions and garden seats, his Lordship said, “ I think it does
 “ not depend on whether any cement is used for fixing
 “ these articles, or whether they rest by their own weight,
 “ but upon this—whether they are strictly and properly
 “ part of the architectural design, . . . and put in
 “ there as such, as distinguished from mere ornaments to
 “ be afterwards added” (i). In the result, therefore, his Lordship held that, with the exception of the chimney-glass and the oil painting surmounting it, none of the articles could be removed by D., inasmuch as they were either essential parts of the house, or formed part of its architectural design.

Although in this case the only articles which Lord Romilly allowed to be removed were mere chattels (j), it seems to be a fair inference from his judgment, that had there been any fixtures which were not essential to the house, in the sense that their removal would have necessitated the substitution of some other article in their place, the personal representative of the tenant for life would have been allowed to remove
 instance, although a personal representative for life or in tail would not, it is subm

Right of personal representatives not limited to chattels.

(i) See *ante*, Chap. I. p. 22 (j) *Id.*
et seq.

Part I.

remove an ornamental chimney-piece, it might, perhaps, be otherwise with reference to such an article as a gaselier. To this extent, therefore, it is thought the case of *D'Eyncourt v. Gregory* is an authority in favour of the right of such representatives.

Analogy of
decisions
between
landlord and
tenant.

It is very questionable whether it would be safe to conclude, that a matter of ornament put up by a tenant for life, &c., might be claimed as personalty by his executor, on the ground that it would be a removable fixture, as between landlord and tenant. Upon this subject the reader will find some observations in the concluding part of the last section; and he will collect from thence how far the decisions in favour of a common tenant may be applied to questions between tenants for life, &c. and those in remainder. It would seem, indeed, from some expressions of Lord Hardwicke and Lord Mansfield, mentioned on a former occasion (*k*), that these judges were disposed to give a very liberal construction to the privilege of the personal representative; for they appear to consider that he is entitled to remove things which have been put up for the general improvement of the estate. There is, however, no instance in which the Courts have acted upon this principle, and it would by no means be safe to rely upon it in any practical question. On the other hand, there can be no doubt that the personal representatives of a tenant for life would not be allowed to remove articles which an ordinary tenant could not remove, as, for instance, the framework of a greenhouse erected in the grounds of a house, though only slightly attached by mortar to a brick foundation (*l*).

General ob-
servations.

In the dearth, therefore, of direct authority in favour of the right of the personal representatives to things set up by tenants for life or in tail, cases respecting the rights of

(*k*) *Ante*, p. 172, note (*p*).

(*l*) *Jenkins v. Gething, ante*,
p. 113.

such persons, which cannot be brought within the decisions Chap. III. s. 2. as to trade fixtures, must in general be left to be inferred from the case of *D'Eyncourt v. Gregory* (*supra*), or from determinations between the heir and executor of the owner in fee (*m*). And where none of those determinations are in point, the question whether an article is part of the real or personal estate, must be examined with reference to the general principles on which the exception in favour of matters of ornament has been allowed in other cases. It will always, however, be material, in the practical application of those principles, to take into consideration the manner in which the article is constructed and affixed, its character and use, and the injury which may be occasioned to the reversionary interest by its removal (*n*).

(*m*) *Post*, p. 242.

(*n*) See *Martin v. Roe*, 26 L. J., Q. B. at p. 132, and the

observations in the concluding part of sect. 4 of Chap. II. *ante*, p. 125.

SECTION III.

*Of the Rights of Tenants for Life or in Tail, during their Lives, in respect of Fixtures.*Part I.

THE two former sections have treated of the right of property in fixtures after the death of a tenant for life, or a tenant in tail; and the rules laid down were intended to apply only to the claims of the personal representatives of those individuals, as against the party who has succeeded to the estate in reversion. But it might be useful to inquire what are the privileges of the tenants themselves in respect of things they annex to their own freehold; and to distinguish between the powers they possess from the general principles of tenure as incident to their estates, and those which they derive under the law of fixtures.

Right of
tenant in tail.

And, first, with respect to a tenant in tail. There can be no doubt that a tenant in tail, by reason of the nature of his estate, and independently of the law of fixtures, may remove whatever he has affixed to the premises, without reference either to the mode of its annexation, or the purpose for which it was put up. For a tenant in tail may commit every kind of waste; and a court of equity will in no case whatsoever restrain him by injunction (a). It seems that the same observation holds in the case of the grantee of tenant in tail; and if there be subsequent grantees, it applies to them also (b). The tenant in tail, however, must exercise his powers during the continuance

(a) Perkins' Profitable of Marlborough, 3 Madd. at
Booke, § 58; *Lord Glenorchy* p. 532. And see 1 Cru. Dig.
v. Bosville, Cas. temp. Talb. Tit. 2, ch. 1, § 32.
at p. 16; *Jervis v. Bruton*, 2 (b) 3 Leon. 121; 8 Bac. Ab.
Vern. 251; *Att.-Gen. v. Duke* tit. Waste (F.) p. 392.

of his estate ; for at the instant of his death they cease (c) ; Chap. III. s. 2. and the right which survives to his personal representative, under the law of fixtures, is of a very inferior nature.

Secondly, with respect to a tenant for life :—although in general he is not permitted to commit waste of any kind, but is impeachable for it, unless the contrary is provided by positive limitation (d), yet, by inference from the right which it has been seen is possessed by his executor after his death, it must be concluded that he is entitled during his life, to remove the same description of things that his executor might claim as part of the personal estate (e). And since the tenant for life is punishable for every act of commissive waste, it is apparent that his title to sever a thing from the freehold cannot arise from a power incident to his estate, but accrues to him by virtue of the law of fixtures only.

Right of
tenant for life.

By the same mode of reasoning it may be inferred, that if a person is tenant *pour auter vie*, he will have all the rights after the death of the *cestui que vie*, that his own executor would have if he were tenant for his own life.

Tenant *pour
auter vie*.

(c) Cru. Dig. *ubi sup.*

(d) 1 Cru. Dig. Tit. 3, ch. 2. But the Chancery Division will not, in general, interfere in the case of *permissive* waste by a tenant for life. See notes to *Lewis Bowles's case*, Tudor, L. C., p. 107 (3rd ed.). And see Appendix (G). And it has been recently decided that an action does not now lie in the Queen's Bench Division in respect of such waste at the suit of a person having merely an equitable estate, *Barnes v. Dowling*, 44 L. T. 809; *secus*, where an express duty to repair is cast

upon him by the instrument creating the estate. *Woodhouse v. Walker*, 5 Q. B. D. 404. As to the powers of the tenant for life of a settled estate, see now 45 & 46 Vict. c. 38, s. 29.

(e) A tenant for life cannot remove those things which he has made an essential part of

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Part I.

Tenant for
life without
impeachment;

But if the tenant for life holds his estate without impeachment of waste, his situation is altogether different. For in this case his powers are much more extensive, and, like those of tenant in tail, arise merely out of his estate. So that, whenever he severs a thing from the freehold, he must be considered to do it by virtue of a right quite independent of the law of fixtures. Still, however, the interest of tenant for life *without impeachment* so far differs from that of tenant in tail, that if a case may be supposed where the removal of an erection put up by the tenant for life himself, would, from its circumstances, amount to an act of *malicious* waste or destruction, it is conceived that he would not be allowed to take it away (*f*).

Nature of
right con-
ferred.

The distinction between the rights which belong to a tenant from his not being impeachable for waste, and those which he derives from the law of fixtures, is pointed out by Lord Holt. He observes, in *Poole's case* (*g*) (in reference to the taking of fixtures in execution), that the case of tenant for years without impeachment is not like that of a

(*f*) There are many important decisions upon the restraints imposed in the Court of Chancery, on the clause "*without impeachment of waste.*" See *Vane v. Lord Barnard*, 2 Vern. 738; *S. C.* Prec. Ch. 454, 1 Eq. Cas. Ab. 399, 1 Salk. 160; *Rolt v. Somerville*, 2 Eq. Cas. Ab. 759; *Packington's case*, 3 Atk. 215; *Aston v. Aston*, 1 Ves. 263; *O'Brien v. O'Brien*, Amb. 107; *Strathmore v. Bowes*, 2 Br. Ch. Cas. 88; *Marq. Downshire v. Lady Sandys*, 6 Ves. 107; *Lord Tamworth v. Lord Ferrers*, 6 Ves. 419; *Day v. Merry*, 16 Ves. 375 a; see also *Chamberlyne v. Dummer*, 1 Br. Ch. Cas. 166; *Parteriche v. Powlett*, 2

Atk. 383; *Burges v. Lamb*, 16 Ves. at p. 185; *Pyne v. Dor*, 1 T. R. at p. 56; Com. Dig. tit. Chancery (D. 11); Tudor, L. C. pp. 112, 115 (3rd ed.). An estate for life *without impeachment of waste* does not now confer any legal right to commit equitable waste, Jud. Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 3. As to the measure of damages where a tenant for life *without impeachment* has cut ornamental timber, *Bubb v. Yelverton*, L. R., 10 Eq. 465. See the doctrine of equitable waste considered generally, per Jessel, M. R., in *Baker v. Sebright*, 13 Ch. D. 179.

(*g*) 1 Salk. 368.

common tenant. In the former case, he allowed that the sheriff could not cut down and sell, though the tenant might; and the reason was, because in that case the tenant had only a bare power without an interest; but a common tenant has an interest as well as a power, as tenant for years has in standing corn, in which case the sheriff can cut down and sell. Chap. III. s. 3.

The rights of a tenant in tail after possibility of issue extinct, in removing things affixed to the freehold, may be considered as being the same as those of a tenant for life without impeachment of waste (*h*). But the grantee of tenant in tail *après possibility* is in the situation of a bare tenant for life (*i*). Tenant *après* possibility.

A tenant by the courtesy is punishable for waste, like a common tenant for life. So likewise is a tenant in dower (*j*). And hence the rights of these parties in fixtures will resemble those which belong to tenants for life. Tenant by the courtesy.

From comparing the rights enjoyed by the owners of these several interests and by their personal representatives, it may be seen that the privilege of removing fixtures after the determination of the particular estate does not arise out of the principle, that whatever a testator might have removed in his lifetime, his executor is entitled to remove after his death. For it has been shown, that the rights of tenants in tail, and tenants for life, differ both in nature and degree; whereas the rights of their executors are in all respects similar. The distinction seems to be, that in the Rights of tenants for life, &c., and of their executors, compared.

(*h*) *Herlakenden's case*, 4 Co. at p. 63 a; *Abraham v. Bubb*, Freem. Cas. Chy. 53; *S.C.* 2 Eq. Cas. Ab. 757; 2 Show. 69; *Anon.*, Freem. Cas. Chy. 279; *Williams v. Williams*, 15 Ves. 419, and 12 East, 209. And see Com. Dig. tit. Chancery (D. 11); Tudor, L. C. at pp. 59, 115 (3rd ed.).
 (*i*) *George Ap Rice's case*, 3 Leon. 241; Co. Lit. 28 a.
 (*j*) 2 Inst. 145, 301, 353.

Part I.

case of a tenant in tail or tenant for life without impeachment of waste, the testator removes articles affixed to the freehold simply by reason of a power incident to an estate in land ; whereas the right of the executor is communicated to him by the law with a view to public benefit and convenience. The analogy of the doctrine of emblements, which is frequently of use in explaining the law of fixtures, seems, in this instance, calculated to mislead.

Many legal inferences of a curious nature appear to result from the comparison here suggested. Thus, in respect of the rights of the executor of a tenant in tail, it is apprehended, that if his testator leaves issue in tail, the executor will not be entitled to greater privileges as to fixtures against the heir in tail, than the executor of tenant in fee simple may be found to have against the heir in fee ; although the heir in tail takes *per formam doni*. Consequently, the right of the executor of a tenant in tail may vary according as it is opposed to that of the heir in tail, or to that of the remainderman or reversioner. That is to say, the same difference will probably be found between the right of the executor of tenant in tail against the issue in tail, and that of the executor of tenant in tail against the remainderman or reversioner, as exists between the right of an executor of tenant in fee against the heir, and the right of an executor of tenant in tail against the remainderman or reversioner (*k*). It would not, however, serve any useful purpose to enter further here into questions of this nature. The object of the present section has been principally to illustrate the principles laid down in the first chapter of the work ; and it is obvious that this illustration could not have been offered at an earlier period, nor until the rights of the several parties whose claims have been examined had been fully developed.

(*k*) See *post*, p. 237.

SECTION IV.

Of Fixtures put up by Ecclesiastical Persons ; and of Dilapidations.

To this chapter may, perhaps, most conveniently be referred another description of cases, in which the right of removing property annexed to land occasionally comes in question ; and this is in the instance of persons holding ecclesiastical benefices.

Chap. III. s. 4.

Removal of fixtures by ecclesiastical persons.

The claims arising between these persons and their successors, in respect of annexations made by them to the freehold, seem very nearly to resemble those which have been the subject of the preceding sections (a). And, accordingly, Bishop Gibson in his Codex (b), in treating of dilapidations, refers to the cases of *Beck v. Rebow*, *Cave v. Cave*, and *Herlakenden's case*, which have frequently been cited in this treatise (c). And he says, that “ he sets “ them down as parallel to the disputes which sometimes “ happen between succeeding incumbents and the ex- “ cutors of their predecessors, as to what may, or may not “ be taken away, and how far the taking them away shall “ be accounted Dilapidation.”

Their rights similar to those of tenants for life, &c.

The questions generally in dispute between ecclesiastical persons relate to matters of ornament or convenience

May remove hangings, grates, &c.

(a) It must be understood that throughout this section only those annexations are referred to which have been put up by such persons at their own expense. Cases in which the cost of the annexation becomes a charge upon the

benefice, as in the case of loans from the governors of Queen Anne's Bounty, stand, of course, upon an entirely different footing.

(b) Page 752.

(c) *E. g. ante*, pp. 42, 106, 107.

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erected in the parsonage-house, &c., by the resident incumbent. And, with respect to things of this description, it is laid down in Burn's Ecclesiastical Law (*d*), that "If an
 " incumbent enter upon a parsonage-house, in which there
 " are hangings, grates, iron backs to chimnies, and such
 " like, not put there by the last incumbent, but which
 " have gone from successor to successor, the executor of
 " the last incumbent shall not have them, but it seemeth
 " that they shall continue in the nature of heir-looms;
 " but if the last incumbent fixed them there only for his
 " own convenience, it seemeth that they shall be deemed
 " as furniture, or household goods, and shall go to his
 " executor."

Cottages or
barns resting
on the
ground.

In *Huntley v. Russell* (*e*), decided in 1849, an incumbent brought an action against the executors of his predecessor, in respect of the removal by him of a cottage, a barn, and a lean-to, all of which rested on the ground, or on bay stones (*f*). The Court of Queen's Bench decided that the defendants were not liable, saying that the incumbent clearly had a right to remove these buildings, inasmuch as they were not fixed to the freehold (*g*). Here the erections in question were mere chattels, but in the subsequent case of *Martin v. Roe* (*h*), the right of the personal representatives of a deceased incumbent to remove more substantial erections came under the consideration of the same Court. In that case a rector had, at his own expense and at a cost of about 600*l.*, put up in the rectory garden two hothouses,

Hothouses.

(*d*) Vol. 4, p. 413.

(*e*) 13 Q. B. 572.

(*f*) One of the buildings stood partly upon posts which had sunk a short distance into the ground. Parke, B., before whom the case was tried, directed the jury that if the intention of the party erecting the posts was merely to prop

up the building, and not to let it into the ground, the sinking described would not, in his opinion, make the building a fixture. And the jury found accordingly that the building was not a fixture. As to this, see *ante*, Chap. I. p. 5.

(*g*) *Ante*, Chap. I. p. 6.

(*h*) 7 E. & B. 237.

a short distance from and unconnected with the rectory house or any other building. The hothouses consisted of low brick walls on which mortar was spread, and bedded into the mortar were wooden frames and glass work, the glass sliding up and down on pulleys. After the death of the rector the plaintiffs, his executors, removed the glass and framework, doing no damage, except that which was necessarily done to the mortar (*i*), and leaving the brick walls untouched. The defendant, the succeeding rector, claimed and took these materials from the plaintiffs, and the question which the Court were called upon to decide was, to which of the parties the materials in question belonged ?

Chap. III. s. 4.

The judgment of the Court was for the plaintiffs, and was delivered by Lord Campbell, C. J., who, after saying that had the testator in his lifetime removed the materials, and even the brick walls, the defendant could not have sued the plaintiffs for dilapidations (*j*), continued : “ It is “ of course a different, and perhaps a more difficult ques- “ tion, whether, if the incumbent at his death leave entire “ on the glebe and in good repair an erection which he “ might have himself removed, the executor may, within “ a reasonable time after his death, remove such parts of “ it as are in their nature fixtures and capable of removal “ without injury to the freehold. . . . The testator has “ committed no waste, either voluntary or permissive : he “ has left on the glebe that which he might have removed, “ and which, being left, imposes no duty on the successor ; “ it is that which, if he had himself severed it from the “ freehold, would clearly have reverted to his personal “ estate and gone to his personal representative. Then “ has he, by leaving them so united to the freehold as the “ case states, annexed them inseparably to it, so that they “ are no longer part of his personal estate ?” His Lord- ship then referred to a passage contained in former editions

Judgment in
Martin v.
Roe.

(*i*) *Ante*, p. 70.

(*j*) As to this, see *post*, p. 198.

Part I.

Distinction
between in-
cumbent and
tenant for life.

of this treatise—to the effect that the privilege of the executor of an incumbent in respect of fixtures is, in general, similar to that of the executor of a tenant for life (*k*)—and said, “ It may be worth observing that there is this distinction between an incumbent and ordinary tenant for life ; that the former has at no time any reversioner with any present interests or rights, whereas, when the latter annexes any thing to the freehold or in any way meddles with it, he annexes to or meddles with that in which some other person or persons has or have at the moment an existing interest which may be increased or decreased in value by what he does, and which the law will protect (*l*). But neither the patron of the benefice nor the future unknown successor has any such interest in the parsonage or glebe ; if anyone can interfere it is the Ordinary, and he not in respect of any interest vested in him, but to advance the general public object of endowments to the clergy. This seems a reason for enlarging the rule as between the executor and successor, where the subject-matter in dispute is not of a kind that can be considered as inalienably attached to the benefice, as in such case there would be no ground even for the interference of the Ordinary In regard to an ecclesiastical benefice, the character and object of the building to which the chattel is attached, and for which it has been so attached, seem of very great consequence in determining whether there was any intention to separate it permanently and irrevocably from the personal estate. Here then is an erection, in itself purely matter of luxury and ornament, which the

(*k*) The passage referred to occurs on page 146 of the 2nd edition, and is as follows:—
“ It may therefore, it is conceived, be laid down, that an incumbent or his executor will, in general, be entitled to fixtures of the same de-

scription as those which form part of the personal estate of a deceased tenant for life, and which have been described in the second section of this chapter.”

(*l*) See further, *Huntley v. Russell*, 13 Q. B. at p. 588.

“ testator might have pulled down, but which he probably
 “ wished to enjoy so long as he lived in the benefice, and
 “ therefore did not remove ; to this, and for the purpose of
 “ completing that luxurious and ornamental creation, a
 “ chattel is so attached that it may be detached without
 “ injury to the freehold. We think the inference is that
 “ it never ceased to be a chattel during the testator’s life,
 “ that it continued to be so at the moment of his death,
 “ and therefore passed as part of the personal estate to the
 “ executors.”

Chap. III. s. 4.

It must be confessed that the latter portion of the judgment, in so far as it decides that the glasswork and framework of the hothouses were mere chattels, does not seem to be in accordance with the authorities referred to in an earlier portion of this work (*m*) ; and it is noticeable that in other passages of the judgment the articles in question were spoken of as *fixtures*. But, be this as it may, it appears to follow from the reasons given by Lord Campbell for the distinction which he points out between the position of the incumbent of a benefice and a tenant for life, that the rights of the personal representatives of the former as to the removal of fixtures are, in many instances, more extensive than those of the representatives of the latter. Indeed, it is tolerably certain that the executors of a tenant for life would not have been permitted to remove the framework of hothouses similar to those in *Martin v. Roe* (*n*).

Rights of executor of incumbent greater than those of executor of tenant for life.

A further question arises in connection with the above case, namely, whether the rights of the personal representatives of an incumbent are co-extensive with those which he himself enjoyed during his life. At first sight the decision in question seems to be an authority for the

Whether executor’s rights co-extensive with incumbent’s.

(*m*) *Ante*, Chap. I. p. 19. *ante*, p. 113.
 And see *Jenkins v. Gething*, (*n*) See *ante*, p. 184.

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negative, for the judgment distinguishes between the rights of an incumbent himself and those of his executors; and although the Court intimated their opinion that the deceased incumbent might, had he chosen, have removed the brick-walls of the hothouses, no such intimation is given with regard to the rights of the plaintiffs. Notwithstanding this, it is thought that with respect to additions which are purely matters of luxury and ornament, the rights of the representatives are as extensive as those of the incumbent himself. Any other view would seem to lead to the conclusion that although he not only *might* but *ought* to remove such additions (*o*), and although his representatives might probably be compelled to pay the expenses incurred by his successor in removing them (*p*), yet they themselves might be prevented by that successor from doing that which it was the duty of their testator to have done, and for whose default in which they are liable. It is submitted, therefore, that as the succeeding incumbent is only entitled to have transmitted to him those things which are necessary to render the parsonage and glebe reasonable and suitable for his residence and sustenance (*q*), he would not be allowed to prevent the removal within a reasonable time, by the representatives of his predecessor, of such things as he himself would not be bound to transmit to his successor. With this exception, however, the rights in respect of fixtures of the representatives of an incumbent appear to be similar to, and no larger than those of the representatives of a tenant for life (*r*).

Ornaments of
bishop's
chapel do not
pass to the
executor.

The ornaments of a bishop's chapel are considered by the law as in a manner fixed to the realty, and in the

(*o*) *Martin v. Roe*, 7 E. & B. at p. 244. And see *post*, p. 198.

(*p*) *S. C.* 7 E. & B. at pp. 239, 240, *per* Coleridge

and Erle, JJ., in argument.

(*q*) *Post*, p. 198 *et seq.*

(*r*) As to which, see *ante*, p. 179.

nature of heir-looms. And on the vacancy of a see they pass to the succeeding bishop, and do not belong to the executors of the deceased party, as in the case of other chattels the property of a sole corporation (s). Chap. III. s. 4.

Where an incumbent voluntarily determines his own interest, either by accepting a benefice, or by resignation, it may be concluded that he would not be allowed afterwards to remove his fixtures; on the same principle that he is not in such a case entitled to emblements (t). Removal after resignation, or accepting benefice.

Dilapidation is a kind of ecclesiastical waste, and is thus defined by Sir Simon Degge in the Parson's Counsellor (u): "A dilapidation is the pulling down, or destroying in any manner any of the houses or buildings belonging to a spiritual living, or the chancel, or suffering them to run into ruin or decay; or wasting and destroying the woods of the church, or committing or suffering any wilful waste in or upon the inheritance of the church." The species of waste that constitutes dilapidation is such as is committed to the rectory-house, barns, outbuildings, &c., belonging thereto, and to the woods, hedges, and fences of the same (v); as also to the chancel of the church. But it is confined to these things, and to fixtures and other annexations which become part and parcel of the freehold; and, therefore, a neglect to cultivate the glebe land in a husbandlike manner, or the digging of gravel or minerals in the glebe, does not amount to dilapidation (w). Dilapidation.

(s) *Bishop of Carlisle's case*, Yr. Bk. 21 Edw. III., p. 48; *Corven's case*, 12 Co. 106.

(t) *Bulwer v. Bulwer*, 2 B. & Ald. 470. See *post*, p. 271.

(u) Page 134.

(v) *Young v. Munby*, 4 M. & S. 183; *Bird v. Relph*, 2 A. & E. 773.

(w) *Bird v. Relph*, 4 B. & Ad. 826; *Huntley v. Russell*, 13 Q. B. at p. 590; *Ross v. Adcock*, L. R., 3 C. P. 655. As to the extent of an incumbent's right to cut timber, see *Duke of Marlborough v. St. John* 21 L. J., Ch. 380; *Sor Fryer*, L. R., 8 Eq.

Part I.

General liability of incumbents.

Wise v. Metcalfe.

It is the duty of the incumbent for the time being to maintain the parsonage-house, and the barns, outbuildings and fences belonging to the benefice, in good and substantial repair, and to transmit them in such condition to his successor. This subject was discussed and considered at great length in the case of *Wise v. Metcalfe* (x), in the King's Bench; in which the liability of the incumbent and his representatives, and the principle upon which the compensation for dilapidations is to be estimated, are very clearly defined. The rule laid down by the Court is, that the incumbent is bound, not only to sustain and repair the buildings belonging to the benefice, but even to restore and rebuild them if necessary, according to the original form, without addition or modern improvement (y). But this obligation extends only to that which is useful, not to such as is matter of ornament or luxury; such as papering, whitewashing, or painting, except so far as is necessary to preserve the timber from decay.

Martin v. Roe.

In the case of *Martin v. Roe* (z), in which, as we have seen, an incumbent had erected two large and costly hot-houses, the Court in their judgment say, "The duty of a present incumbent and the right of a succeeding incumbent, as such, are correlative. Any matter of needless expense, or luxury, or ornament, in which the present incumbent, to gratify his own taste, has indulged himself (blameably or not is immaterial), he is not only not bound, but he ought not, to transmit to his successor. If the successor may recover damages from the executors because such things have been removed by their testator, there can be no doubt he, in his turn, must maintain them; and what he must maintain he must also restore and rebuild when decayed by his fault, and so the benefice will become permanently saddled with a useless burthen, and an in-

Benefice not to be saddled with useless burdens.

(x) 10 B. & C. 299.

(z) 7 E. & B. 237. *Ante*,

(y) *Percival v. Cooke*, 2 C. p. 192.

& P. 460.

“ definite, it may be ruinous, expense (a). Hothouses, Chap. III. c. 4.
 “ pineries, and conservatories do not, in this respect, differ
 “ from observatories, menageries, or aviaries; they are
 “ equally what, in a Provincial Constitution of 1236,
 “ 21 Hen. III., are called *impensæ voluptuosæ*, as distin-
 “ guished from *necessariæ*.” After stating that whatever
 the succeeding incumbent is entitled to receive he must
 transmit, the judgment continues:—“ The extent to which,
 “ in any particular case, this reciprocal right and duty will
 “ go must be determined by a liberal and sensible con-
 “ sideration of the circumstances. It is impossible, from
 “ the nature of the thing, to lay down a more precise
 “ rule.”

Whatever
incumbent
entitled to
receive he
must trans-
mit.

To constitute dilapidation there must exist one at least
 of the three following requisites:—(α) A diminution of
 the value of the estate; or (β) an increase of the burden
 upon it; or (γ) an impairing of the evidence of title (δ).
 Thus, it has been held that it is not dilapidation for an
 incumbent to take down a barn and substitute another
 which is more beneficial to the estate (ε).

What con-
stitutes
dilapidation.

The remedy for dilapidation is in its nature similar to
 that provided against the owners of particular estates.
 For bishops, rectors, parsons, vicars and other ecclesiastical
 persons, are considered in questions respecting the waste
 of lands which they hold *jure ecclesiæ*, as tenants for
 life (δ). An action lay at the common law, upon the
 custom of the realm, for damages in respect of dilapi-

Remedy at
common law.

(a) See now 34
 c. 43, s. 71; *post*,
 (b) *Huntley v.*
Q. B. at p. 588.
 (c) *Huntley v.*
Q. B. 572. See 3.
 c. 43, s. 70, *post*,]
 (d) 2 Roll. Ab.
 p. 813; *Stockman*

Enight v.
Strachy
 6; *Duke*
St. John,
 ; *Hunt-*
B. at p.
 t. 341 a;
v. Skip-

Part I.

dations (e); though the right to sue in the Temporal Courts was not settled till the case of *Jones v. Hill* (f) [temp. 2 Will. & Mary]. It lay also in the Spiritual Courts by the canon law (g). The action could be brought by the successor against the predecessor if living, or if dead, then against his personal representatives. The action against the representatives of the tortfeasor was in this respect an anomaly, and an exception to the general rule, *actio personalis moritur cum personâ* (h). An action lay also by the representatives of a deceased incumbent against those of his predecessor, where there had been dilapidations in the lifetime of the predecessor, in respect of which the plaintiffs had become liable to a succeeding incumbent (i).

Party suing
must have the
legal estate.

But if the successor have not the legal estate in the parsonage-house, lands, &c., he cannot bring an action for dilapidations (j). If, however, the successor, being entitled to the legal estate, is put into possession of a part of the glebe, it is equivalent to an induction into the whole (k).

(e) 1 Lil. Ent. 21, 68 (5th ed.); *Radcliffe v. D'Oyly*, 2 T. R. 630; 3 Bl. Com. 91. If there were timber or stone upon the glebe fit for the necessary repairs, that fact went in diminution of damages. *Percival v. Cooke*, 2 C. & P. 460; *Bunbury v. Hewson*, 3 Exch. 558. It was an incident of the custom upon which the action was based that the claim for dilapidations was postponed to the payment of all debts. *Bryan v. Clay*, 22 L. J., Q. B. 23; compare *Bisset v. Burgess*, 23 Beav. 278. See *post*, p. 205, note (i).

(f) 3 Lev. 268; S. C. Carth.

224. And see *Mason v. Lambert*, 12 Q. B. at p. 800.

(g) Respecting the proceedings in the Ecclesiastical Court, see Gibson's Codex, 751 *et seq.*, 1499 *et seq.*; and 3 Bl. Com. 91.

(h) *Martin v. Roe*, 7 E. & B. at p. 246. And see *post*, p. 356.

(i) *Bunbury v. Hewson*, 3 Exch. 558.

(j) *Wright v. Smythies*, 10 East, 409; *Browne v. Ramsden*, 8 Taunt. 559. And see *Mason v. Lambert*, 12 Q. B. at p. 807.

(k) *Bulwer v. Bulwer*, 2 B. & Ald. 470.

Upon an exchange of livings by agreement, after mutual institution and induction, one incumbent may sue the other for dilapidation; and this, although neither party at the time may have contemplated any such claim. For they have the same rights as in a common case of presentation; and it cannot be implied in such an agreement that either party was not to be liable for dilapidations (*l*). If, however, there be such an agreement, it is not necessarily simoniacal (*m*).

Chap. III. s. 4.
Remedy on
exchange of
livings.

A prebendary, or his personal representative, is liable to the successor for the waste of a prebendal house (*n*). And in like manner a vicar-choral of a cathedral, or his representative, is liable at the suit of his successor in respect of dilapidations to the house which he held as vicar-choral (*o*). So, also, a sequestrator might be sued for dilapidations (*p*). But since the passing of the Ecclesiastical Dilapidations Act, 1871, a sequestrator in whose hands a sum of money remains upon the death of the incumbent is not liable in respect of that sum for dilapidations not reported until after the death of the incumbent; for by that Act the claim for dilapidations in such a case is a debt due from the representatives of the late incumbent (*q*). An action for dilapidations lies by the succeeding vicar against his predecessor, who, by taking a benefice, has lost his vicarage (*r*).

Liability of
prebendary,
Vicar-choral,
Sequestrator.

Vicar accept-
ing a benefice.

It has been held, however, that a curate appointed by the impropriator, and licensed by the archbishop, but not

Curate with-
out institution
or induction.

(*l*) *Downes v. Craig*, 9 M. & W. 166.

(*o*) *Gleaves v. Parfitt*, 29 L. J., C. P. 216.

(*m*) *Goldham v. Edwards*, 25 L. J., C. P. 223. And in this respect the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43, *post*, p. 203), has made no difference. *Wright v. Davies*, 1 C. P. D. 638.

1
H
Cl
p.

(*n*) *Radcliffe v. D'Oyly*, 2 T. R. 630.

tic

Part I.

**Perpetual
 curate.**

instituted or inducted, is not liable to be sued for dilapidations (*s*). But a perpetual curate not removable at the will of the patron is so liable (*t*).

Bishop.

Although there exists no precedent of an action at common law by a bishop against his predecessor or representatives, and the custom, as generally pleaded in the old precedents, does not specify bishops (*u*), yet there seems to be no sufficient reason for doubting that upon principle such an action would lie. The action itself is an anomalous one, the right to which in the Temporal Courts was not settled till the end of the seventeenth century (*v*); and the authorities show that the fact that the precedents do not mention bishops, or that no such action has hitherto been brought, would not be conclusive against the existence of a right of action against such persons (*w*). Not only may the Crown and the Metropolitan proceed against a bishop for dilapidations (*x*), but there seems to be one precedent at least of proceedings in the Court of Arches by a bishop against the representative of his predecessor, in which a claim was established to a very large amount in respect of dilapidations to the palace and cathedral (*y*).

(*s*) *Pawly v. Wiseman*, 3 Keb. 614.

(*t*) *Mason v. Lambert*, 12 Q. B. 795. See now 34 & 35 Vict. c. 43, s. 3, *post*, p. 204, note (*e*).

(*u*) The custom is stated by Degge in the *Parson's Counsellor* (7th ed.), p. 138, as applying to "*Omnes et singuli prebendarii, rectores, vicarii regni Angliæ.*"

(*v*) *Ante*, p. 200.

(*w*) See *Mason v. Lambert*, 12 Q. B. at p. 801; *Gleaves v. Parfitt*, 29 L. J., C. P. at p. 219. And see *Radcliffe v.*

D'Oyly, 2 T. R. 630.

(*x*) See *Jefferson v. Bishop of Durham*, 1 Bos. & Pul. 105, 131, per Heath, J. And see *Wither v. Dean, &c. of Winchester*, 3 Mer. 421; *Knight v. Moseley*, Amb. 176.

(*y*) The case is thus referred to in *Nelson's Rights of the Clergy* (2nd ed.), tit. Dilapidations:—"The prosecution for this offence . . . was brought by Bishop Bancroft against the son and heir of his predecessor Bishop Aylmer; against whom he obtained a sentence in

Remedies have been from time to time provided by particular statutes (z); but at the present day, as regards parochial clergy, claims in respect of dilapidations fall under the provisions of the Ecclesiastical Dilapidations Act, 1871 (a), which, while leaving unchanged the common law duty and liability of incumbents, has created a new machinery for enforcing them (b), and has made an important change in the form of remedy for dilapidations, by substituting, in lieu of the former action on the case, an action for an ascertained amount which becomes a debt. This Act came into operation on the 1st of August, 1871 (c). As a lengthened examination of its provisions would be out of place in these pages, it will be sufficient here to state shortly the purport of those sections which are more immediately connected with our present subject.

Chap. III. s. 4.

Remedy by statute.

Ecclesiastical Dilapidations Act, 1871.

“the Arches for 4,210*l.* for
“dilapidations in the Palace
“and Cathedral of his bishop-
“ric; and because the son
“had not a personal estate
“from his father sufficient to
“satisfy the damages, the
“Lord Treasurer Burleigh
“was desired to exhibit a bill
“in Parliament for the sale of
“so much of Bishop Aylmer’s
“estate as might discharge
“the same. ’Tis true such a
“bill is very equitable, espe-
“cially when the lands which
“descend to the son were pur-
“chased with that money,
“which should have been laid
“out in repairing the Church;
“and, therefore, the heir
“compounded with Bishop
“Bancroft for a good sum
“of money, to prevent him
“making a law to enforce him
“to pay the whole.” And see
34 & 35 Vict. c. 43, ss. 25, 28,

post, p. 208.

(z) See 13 Eliz. c. 10; 14 Eliz. c. 11 (repealed in part by Statute Law Revision Act, 1863); 17 Geo. III. c. 53. See, too, 34 & 35 Vict. c. 43, s. 73. It is said also to be good cause of deprivation if an ecclesiastical person dilapidates the patrimony of the Church. 3 Bl. Com. 91; Degge, p. 137; *Wood’s case*, cited 12 Mod. 237; 3 Inst. 204; *Bishop of Salisbury’s case*, Godbolt, 259; *Combe v. De la Bere*, 6 P. D. at p. 164.

(a) 34 & 35 Vict. c. 43, amended by 35 & 36 Vict. c. 96. The amendments effected by the later Act are not material for the purposes of this work.

(b) See *Wright v. Davies*, 1 C. P. D. at p. 647, per Brett, J., and at p. 651, per Jessel, M. R.

(c) 34 & 35 Vict. c. 43, s. 1.

Part I.

Inspection by
diocesan
surveyors.

Execution of
repairs.

Recovery by
new in-
cumbent of
cost of.

The Act provides for the appointment of diocesan surveyors (*d*), who are to inspect and report upon the state of such of the houses of residence, chancels, walls, fences, and other buildings and things belonging to a benefice (*e*), as the incumbent is by law or custom bound to maintain in repair (*f*). Such inspections may take place either when the benefice is full, or upon a vacancy occurring. In the former case, where the incumbent fails to execute the repairs prescribed by the surveyor in his report, the bishop may raise the prescribed sum by sequestration of the profits of the benefice (*g*), and the repairs will then be executed under the direction of the surveyor, who may employ builders or contractors for the purpose (*h*). In the latter case, upon the bishop making an order stating the repairs and their cost, for which the late incumbent is, or his executors or administrators are, liable, the new incumbent is to cause the repairs to be executed, and the sum stated in the order as their cost is to be a *debt* due

(*d*) 34 & 35 Vict. c. 43, ss. 8—11.

(*e*) The term “benefice” in the Act comprehends all rectories with cure of souls, vicarages, perpetual curacies, donatives, endowed public chapels, and parochial chapelries, and chapelries or districts belonging or reputed to belong, or annexed or reputed to be annexed, to any church or chapel. Sect. 3.

(*f*) Sects. 4, 12—16, 29—34. The provisions of sect. 29 as to the time within which the bishop is to direct an inspection and report after the avoidance of a benefice, are directory only and not imperative. *Caldow v. Pixell*, 2 C.

P. D. 562; *Gleaves v. Mariner*, 1 Ex. D. 107.

(*g*) Sect. 23. The sequestrator is to pay the profits of the benefice (after certain deductions) to the Governors of Queen Anne’s Bounty until the whole of the sum stated has been paid, and the governors are to pay such moneys to the credit of a dilapidation account to be opened by them. Sects. 20, 21.

(*h*) Sect. 45. As to the vacation of a benefice after inspection and before a certificate of completion of repairs has been signed, and the liability of the outgoing and incoming incumbent respectively, see sect. 49.

to him, and recoverable from the late incumbent or his representatives (i). Chap. III. s. 4.

If the new incumbent fails to have the specified repairs done they are to be executed under the direction of the surveyor, who, as in the case already mentioned, may employ persons for the purpose (j). Failure by new incumbent to execute repairs.

The Governors of Queen Anne's Bounty are empowered to make loans, either to incumbents or new incumbents, and such loans are to be placed to the credit of a dilapidation account opened by the governors with the incumbent in question (k). Any amounts recovered by a new incumbent from his predecessor, or his representatives, in respect of dilapidations, are to be paid to the governors to the credit of this dilapidation account (or, if no loan has been made to the new incumbent, to the credit of a dilapidation account then to be opened), and the new incumbent is also to pay to the governors, to the credit of the said account, such sum (if any) as together with the sums theretofore carried to the credit of the said account will make up the sum stated in the order as the cost of the repairs (l); and these payments may be enforced by sequestration (m). Loans from, and payments to, Queen Anne's Bounty.

As regards the mode of payment for repairs executed, the Act provides that, to the extent of the moneys standing to the credit of the dilapidation account (if any has been opened), the governors are to pay for the repairs executed, but if any further sum is required for the completion of the repairs, the same is to be paid by the incumbent (n). Payment for repairs.

(i) Sects. 34, 36, 42. The claim under the statute will therefore rank with the other debts of a deceased incumbent. See 32 & 33 Vict. c. 46. And see Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10. As to the difference in this respect between actions under the statute and actions upon the custom, see *ante*, p. 200, note (e).

(j) Sect. 45.

(k) Sects. 17, 18, 38, 39.

(l) Sects. 37, 40.

(m) Sect. 43.

(n) Sects. 44, 45. There are no provisions in the Act for

Part I.

Surveyor's
certificate of
completion.

On the completion of the repairs to the satisfaction of the surveyor, he is to give a certificate, which is to be registered in the registry of the diocese, and this certificate will be conclusive evidence of the due execution of the prescribed works (*o*). No further or subsequent report is to be made as to the buildings, &c. specified in the certificate (except at the request of the incumbent himself) before the end of five years from the registration (*p*) of the certificate; and if the benefice becomes vacant within such period, the incumbent or his representatives is or are not to be liable to any claim for dilapidations in respect of the buildings, &c., except for wilful waste or failure to insure the house of residence and buildings, &c., belonging to the benefice, in accordance with the provisions of the Act (*q*).

Provisions as
to persons
being in-
cumbents at
commence-
ment of Act.

The Act further provides that if an incumbent holding a benefice at the time of the commencement of the Act, —*i.e.*, 1st of August, 1871—has prior thereto (without due authority) caused any buildings, &c., belonging to his benefice to be pulled down, and has substituted other buildings of equal or greater value, such incumbent is (if the bishop of the diocese consent) not to be liable to (*sic*) dilapidations in respect of the buildings so pulled down, provided such substituted buildings have been insured pursuant to the Act; and that no incumbent holding a benefice upon the 1st of August, 1871, is to be liable for

compelling payment of this further sum by the incumbent, for sect. 43 only enables the bishop to raise by sequestration the moneys payable to the governors. It is thought that the builders or contractors employed by the surveyor could not sue the incumbent for work done by them, there being no privity between him and them.

(*o*) 34 & 35 Vict. c. 43, s. 46.
The certificate is to be in tripli-

cate, one part to be delivered to the incumbent or the sequestrator, another registered, and the third delivered to the Governors of Queen Anne's Bounty.

(*p*) In the section the word "filing" is used; but sect. 46 merely directs that the certificate be *registered*.

(*q*) Sect. 47. For the general provisions as to insurance, see sects. 54—57.

dilapidations in respect of buildings pulled down by a preceding incumbent, unless the incumbent so holding such benefice has received or is entitled to recover from Chap. III. s. 4. *the last preceding* incumbent, or his estate, the amount chargeable on account of such dilapidations, and in such case the liability of the existing incumbent is to be limited to the amount so received or recoverable (*r*). We have already seen that prior to the Act the substitution of buildings which were more beneficial to the estate did not constitute dilapidation (*s*), and that an incumbent incurred no liability by pulling down erections put up by him where they were merely luxurious and ornamental (*t*).

Section 71 provides that wherever it shall appear that any building belonging to, or forming part of, any house of residence is unnecessary, it shall be lawful for the bishop, upon the application of the incumbent and with the consent in writing of the patron of the benefice, to authorize, by a written instrument under his hand, the removal of the said building; and the proceeds, if any, of such removal shall be applied to the improvement of the benefice in such manner as the bishop of the diocese and the patron of the benefice may agree on. Removal of unnecessary buildings.

The Act does not apply to buildings, &c., standing on the lands belonging to the benefice, which are comprised in any lease for years or lives, so long as such lease shall be subsisting, except so far as the lessee is not liable to insure, rebuild, or repair such buildings, &c.; but the surveyor may inspect the demised buildings (*u*). No sum Buildings on lease.

(*r*) Sect. 70. *Semble*, the latter part of the section would protect an incumbent whose right of action against his immediate predecessor (see *Bunbury v. Hewson*, 3 Exch. 558) was barred prior to 1st of August, 1871, by lapse of time.

(*s*) *Ante*, p. 199.

(*t*) *Ante*, p. 198.

(*u*) Sect. 58. And see sect. 59 as to production of lease or counterpart. As to the leas-

Part I.

is to be recoverable for dilapidations in respect of any benefice becoming vacant upon or after the 1st of August, 1871, and to which the Act is applicable, unless the claim for such sum be founded on an order made under the provisions of the Act (*v*); but the Act does not affect the powers which before its passing any bishop or archdeacon or other ordinary possessed in respect of requiring the repairs of any ecclesiastical building to be executed (*w*).

General
result of Act.

From this short summary, it will be seen that as regards incumbents of benefices to which the Act applies, the customary action upon the case against their predecessor or his representatives has been abolished (*x*); but, on the other hand, that its provisions are applicable only to such annexations as an incumbent was, prior to the Act, by law or custom bound to repair (*y*). And it is clear that a new incumbent has always been, and still is, liable to put such things in repair, although he may have recovered nothing from his predecessor or his estate (*z*).

Archbishops
and bishops,
&c., may
employ sur-
veyor and
obtain cer-
tificate.

The provisions of this Act are, generally speaking, applicable only to parochial clergy, and, therefore, it is evident that in many cases, as in that of bishops and dignitaries of cathedral and collegiate churches, the former remedies

ing powers of incumbents, see Woodfall's Landlord and Tenant (12th ed.), p. 16 *et seq.* It might perhaps be argued that section 58 only exempts the incumbent from the provisions of the Act regarding insurance, as sect. 54 is the only other section which refers specifically to buildings "*standing on the lands*" belonging to the benefice; but if this were so the provision as to inspection by the

surveyor would have been unnecessary, as such a right would exist by virtue of the other provisions of the Act. It is difficult to see the utility of the surveyor's inspection, as no proceedings can be taken on it under the Act.

(*v*) 34 & 35 Vict. c. 43, s. 53.

(*w*) Sect. 72.

(*x*) Sect. 53, *supra*.

(*y*) Sect. 4, *ante*, p. 204.

(*z*) *Wright v. Davies*, 1 C. P. D. at pp. 646, 651.

may still exist. But the Act has provided that it shall be lawful for any archbishop or bishop, and for the holder of any dignity or office in any cathedral or collegiate church, to employ a surveyor approved by the Ecclesiastical Commissioners, and that the certificate of such surveyor shall be conclusive evidence of the due execution of necessary works, to any house of residence or other building, which he is bound to maintain and repair at his own personal cost (*a*); and it is provided that where advantage has been taken of this provision, if a vacancy occurs within five years from the filing of the certificate, the archbishop or bishop, or the holder of the dignity or office, as the case may be, or his representatives, shall not be liable to any claim for dilapidations, either under the Act, or at the suit of any successor independently of the Act (*b*), except for wilful waste and loss or damage by fire, provided an insurance has been effected in accordance with the provisions of the Act (*c*).

Chap. III. s. 4.

Under recent Acts jurisdiction has been given to the Ecclesiastical Commissioners over lands constituting the endowment of sees of archbishops or bishops, and in respect of dilapidations on estates forming such endowments all remedies are vested in such Commissioners, and no archbishop or bishop succeeding to a see is to have any claim against his predecessor therein or the representatives of such predecessor (*d*).

Jurisdiction
of Ecclesiasti-
cal Commis-
sioners.

The examples here offered will be sufficient to point out the general doctrine of the law concerning dilapidation,

(*a*) Sects. 25—27.

(*b*) These words would seem to be intended to meet the case of a person who is possessed of one house of residence, &c. in a dual capacity, as, for instance, the dean of a cathedral

being also rector of a parish in the cathedral city.

(*c*) Sect. 28.

(*d*) See 23 & 24 Vict. c. 124, s. 9; 29 & 30 Vict. c. 111, ss. 12, 13.

Part I.

and for further information on this subject the reader is referred to the authorities cited in the note (e).

(e) Vin. Ab. tit. Dilapidations, with Serjt. Hill's notes, in Lincoln's Inn Library. Stillingfleet's Ecclesiastical Cases, part i. p. 86 *et seq.*; Degge, p. 134 *et seq.*; Godolph. Repertor. p. 173 *et seq.*; Watson's Complete Incumbent, p. 740; Gibson's Codex, 751 *et seq.*; Burn's Eccl. Law, p. 146 a, tit. Dilapidations; Woodeson's Vin. Lect. vol.

iii. 205; Cripps on Clergy (5th ed.), p. 311 *et seq.*; 2 Phill. Eccl. Law, p. 1610 *et seq.*; Gibbons on Dilapidations (2nd ed.) *passim*. See also as to proceedings for waste by action, and by prohibition, and injunction, in the second part of this work, *post*, p. 351 *et seq.*; also *Knowle v. Harvey*, 1 Roll. Rep. 335; *Liford's case*, 11 Co. 49 a.

CHAPTER IV.

OF THE RIGHT TO FIXTURES BETWEEN HEIR AND EXECUTOR ; —AND OF CHARTERS, HEIR-LOOMS, EMBLEMENTS, ETC.

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SECTION I.

Of the Right of the Executor to Fixtures put up for Trade, or for Trade combined with other Objects.

THERE is a third class of persons, according to the division proposed at the beginning of the second chapter, between whom questions as to fixtures not unfrequently arise ; viz., the personal representative and the heir of a tenant in fee. The respective claims of these individuals in things affixed to the freehold remain now to be considered (a). The simple inquiry is this :—If the owner of the inheritance annexes a personal chattel to the soil, in whom will the right of property in it vest after his decease ; in his personal representative, or in the heir who takes the inheritance in the land ?

Chap. IV. s. 1.
Fixtures between heir and executor.

There appears to be more uncertainty in the doctrine of fixtures, as it applies to the case of 1 than to that of any other class of persons.

(a) For the right to fixtures the reader as between the executor and the devisee of a tenant in fee, V., § 5, p.

Part I. difficulty seems in this instance to relate, not merely to the extent of the executor's right, but to the existence of the right itself, it may be proper, before proceeding to an examination of the cases, to consider the early opinions upon this subject, with more attention than was thought necessary when considering the claims of other parties.

**Ancient
authorities.**

In the early periods of the law, it was considered an inflexible rule, that whatever was affixed to the freehold should descend to the heir as part and parcel of the inheritance. On referring to the authorities, it will be found that so long ago as in the reign of Henry VII. questions between the executor and the heir as to things set up by the owner in fee, came before the Courts; and it was then clearly laid down, that the executor was not entitled to any thing that was connected with the testator's freehold. Thus, in the Year Book 20 Hen. 7, p. 13, trespass was brought by the heir against the executors of an owner in fee for taking away a furnace fixed with mortar to the freehold. And the Court held that the taking by the executors was tortious.

Furnaces.

In another case, in the Year Book 21 Hen. 7, p. 26, an action was brought against an executor for removing a furnace which was not fixed to the walls, but to the middle of a house. On this occasion the Court thought that the circumstance of the annexation being to the earth only, would not support the executor's claim to the furnace, though it might give a lessee a right to it. They held, therefore, that the furnace belonged to the heir, and that the action well lay by him. And it was said by Kingsmill, J., that the furnace, after it is fixed to the freehold, is incident to, and becomes parcel of, the freehold; and that the heir should have posts fixed to the ground by the ancestor; and so of vats fixed in a brewhouse or dyehouse: for "when they are fixed they are for the continual profit of the house; and therefore it is more

“ reasonable that the heir should have them, to whom the
 “ freehold to which they are joined belongs, than the
 “ executors, who have nothing to do with the freehold.”
 And Rede, C. J., observed, “ The executors shall have
 “ all manner of chattels which were their testator’s; but
 “ it is where they are properly in the nature of chattels;
 “ therefore here, when this furnace was annexed and fixed
 “ to the land, it is, as it were, a thing of a higher nature,
 “ and in a manner is made incident to this, as in the
 “ case put of tables dormant, the heir shall have them
 “ after the death of the person, and not the executor: and
 “ for this reason, that when they are joined to the in-
 “ heritance, it is agreeable to reason that they should pass
 “ with the inheritance.” The same principle appears to
 have governed the decision of a case in Hilary Term,
 22 Hen. 7 (b).

Chap. IV. s. 1.

The several early text-writers, who have treated of the
 respective claims of the heir and executor, express them-
 selves in exact conformity with these cases. In Swin-
 burne’s *Treatise of Wills* (c), the author, in stating what
 matters are to be put into the inventory of the executor,

Early text-
writers.

(b) Keilw. 88. See also
 Yr. Bk. 8 Hen. 7, p. 12; *Day*
v. Austin, Owen, 70; *Wood*
v. Smith, Cro. Jac. 129; *Her-*
lakenden’s case, 4 Co. 63 b, 64.
 See, too, in Br. Ab. tit. Chattels,
 pl. 7 (citing the above cases).
 “ The same law of paling,
 “ and windows, and posts or
 “ doors of a house, they shall
 “ go to the heir, and yet they
 “ are not fixed. But it is not
 “ a perfect house without
 “ them.” It is then added,
 “ the contrary of glass, for the
 “ executor shall have this:
 “ for the house is perfect with-
 “ out the glass. *Per* Pollarde,
 “ *quod non negatur.*” And

see *id.* tit. Executors, pl. 95;
 Roll. Ab. tit. Waste, 819;
 Bac. Ab. tit. Executor (H. 3).
 Of glass, however, Lord Coke
 observes, that waste may be
 committed of it, for it is a
 parcel of the house, and shall
 descend as parcel of the in-
 heritance to the heir, and the
 executors shall not have it.
Herlakenden’s case, 4 Co. 63 b;
 Went. Off. Executors, 151
 (14th ed.).

(c) Pt. 6, § 7, p. 758 (7th
 ed.); *id.* 256. And see
 Godolph. Orph. Leg. pt. 2,
 c. 14; Law of Test. 342 (2nd
 ed.).

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Early text-
writers.

observes, that glass, annexed to the windows of the house, is parcel of the inheritance, and the executor shall not have it, and that the like may be concluded of wainscot, howsoever it may be affixed; and if the executors should remove it, they are punishable for the same. He also adds:—"Not only glass and wainscot, but any other such like things affixed to the freehold, or to the ground with mortar and stone: as tables dormant, leads, bayes, mangers, &c., for these belong to the heir, and not to the executor."

So, in Sheppard's Touchstone (*d*), it is said that an executor or administrator "shall not have the incidents of a house, as glass, doors, wainscot, and the like, no more than the house itself; nor pales, walls, staulks," &c. And again, "tables dormant, furnaces of lead and brass, and vats in a brew and dye house, standing and fastened to the walls, or standing in or fastened to the ground in the middle of the house (though fastened to no wall); a copper or lead fixed to the house; the doors within and without that are hanging and serving to any part of the house, shall not go to the executor or administrator to be divided and sold from the house, albeit the executor or administrator have a lease for years of the house, and by that means hath the house also. But if the glass be from the windows, or there be wainscot loose, or doors more than are used, that are not hanging or the like: these things shall go to the executor or administrator."

The same doctrine is laid down in Wentworth's Office of Executors (*e*). And mill-stones, anvils, doors, keys and windows, have been enumerated, of which it is said, none of these be chattels, but parcel of the freehold, or there-

(*d*) Pp. 469, 470.

(*e*) Pp. 138, 150 (14th ed.).
This and the work last cited

are attributed to the same author, Mr. Justice Doderidge.

unto pertaining, and therefore shall not go to the executors (*f*). So, in Noy's Maxims (*g*), it is said that the "heir shall have not only the glass and wainscot, but "any other of such like things affixed to the freehold or "ground, as tables, dormants, furnaces, vats in the brew- "house or dyehouse." And again, "All chattels shall go "to the executor, as vats and furnaces fixed in a brew- "house or dyehouse by the lessee, but if they be fixed by "tenant in fee, the heir shall have them."

Chap. IV. s. 1.

On referring to authorities of a still later date, it will be found that the rule of law is laid down with the same degree of strictness in favour of the heir. Thus, in Comyns' Digest (*h*), it is said, that goods and chattels annexed to the freehold go to the heir, as the glass in a window, the doors and locks of a house. And the author refers to several of the foregoing cases (*i*).

Later text-
writers.

Sir Michael Foster, in his Report of Crown Cases (*j*), in discussing the question whether a cupboard or chest let into a wall is so far a part of the house, as to make the breaking it open to be burglary at common law, or an offence within the statutes respecting housebreaking, considers that in general the annexation of articles of this description makes them part of the freehold, and the property of the heir; though the rule in criminal cases is other-

(*f*) Bac. Ab. tit. Executors (H. 3); Vin. Ab. tit. Executors, p. 166, and see *ante*, p. 20.

(*g*) Pp. 239, 144 (9th ed.).

(*h*) Tit. Biens (B.).

(*i*) It has been laid down that dung in a heap is a chattel, and goes to the executor; but if spread upon the land, so that it cannot be taken without taking the soil with it, then it is accounted parcel

of the freehold. *Carver v. Pierce*, Sty. 66; *S. C. sub nom. Yearworth v. Pierce*, Aleyn, 32. See also Noy, Max. 119; *Higgon v. Mortimer*, 6 C. & P. 616; *Blewett v. Tregonning*, 3 A. & E. 554, and the judgments of Little-
dale, J., and Patteson, J., in that case. In the civil law
dung¹ red ac-
ces

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wise, in *favorem vitæ*. He says, "With regard to cup-boards, presses, lockers, and other fixtures of the like kind, I think we must, in favour of life, distinguish between cases relative to mere property, and such wherein life is concerned. In questions between the heir or devisee and the executor, those fixtures may with propriety enough be considered as annexed to, and parts of the freehold. The law will presume that it was the intention of the owner under whose bounty the executor claimeth, that they should be so considered; to the end that the house might remain to those, who by operation of law or by his bequest, should become entitled to it, in the same plight he put it or should leave it, entire and undefaced."

Modern
decisions.

Such, therefore, was the established rule of law with regard to annexations to the freehold, as observed with great rigour for a long period of time. But this strictness has, in later times, given way to a more liberal construction in favour of the executor and the personal estate in certain cases; and a departure from the ancient rule, with regard as well to fixtures put up for trade, as to those put up for other purposes, has been recognized, to a certain extent, by several modern authorities which are entitled to the highest consideration. Many, however, have hesitated to acquiesce in the propriety of this departure from the general rule. And with respect to the particular class of fixtures which are put up in relation to trade, two important judgments of the House of Lords appear to throw very considerable doubt upon the authorities in question. For it has been laid down that the principle upon which a relaxation in favour of trade is founded, is not applicable to questions between the heir and executor of the owner of the inheritance. Such appears to be the result of the cases of *Fisher v. Dixon* (*k*),

(*k*) 12 Cl. & F. 312.

and *Bain v. Brand* (l); as far at least as respects machinery Chap. IV. s. 1. put up by the owner of the inheritance for the purpose of the beneficial enjoyment of the land, in the trade and business he carries on there, and which is necessary for such enjoyment. These decisions it will be necessary to consider hereafter (m). But as the former case was the first instance in modern times in which this restriction was expressly laid down, it will be proper first to review the several authorities above alluded to, in which a relaxation in favour of the personal estate has been allowed in things partly or wholly essential to trade.

There is no case to be met with in the reports, in which Cider mills. an exception in favour of trade fixtures was allowed as between executor and heir, until after the indulgence had been confirmed to a common tenant on the authority of *Poole's case* (n). For the first instance in which this principle appears to have been recognized as between these parties is in a decision of Chief Baron Comyns respecting a cider-mill. In an action of trover brought by an executor against the heir for a cider-mill let into the ground, and affixed to the freehold, the Chief Baron held at Nisi Prius that it was personal estate, and directed the jury to find for the executor. This decision was mentioned for the first time in the discussion of the case of *Lacton v. Lacton* (o). Lord Hardwicke, on that occasion, approved of the Chief Baron's determination, and speaks of the decision with great respect; and in the case of *Lord Dudley v. Lord Warde* (p), which came subsequently before him, he said expressly, that his judgments were partly founded upon that authority. The

(l) 1 App. Cas. 762.

(m) *Post*, pp. 225, 231.

(n) 1 Salk. 368 (Mic. T. 2 Ann.).

(o) 3 Atk. at p. 14. It was cited by Mr. Wilbraham in

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nor are the facts particularly mentioned. But the ground upon which it is generally supposed to have proceeded is, that it fell within the rule in favour of trade fixtures, and that the mill was to be considered in the nature of personalty, because the making of cider was a species of trade.

Grounds of
decision as to
cider-mill.

Such appears to have been Lord Hardwicke's view of the decision. For in one part of his judgment in *Laulton v. Laulton* (*q*), he says, that in cases between ancestor and heir, as well as between other parties, the law "does admit" the consideration of public conveniency for determining "the question." And, moreover, he observes that the rule with respect to fixtures is like that of emblements, which, for the benefit of the kingdom, the law gives to the executor, and will not suffer them to go to the heir. Mr. Justice Buller considers the cider-mill as on a footing in this respect with other trading fixtures of the same sort, as "brewing vessels, coppers, and fire-engines" (*r*). As does also Lord Kenyon, in the case of *Dean v. Allalley* (*s*). And so Lord Ellenborough, in *Eluces v. Maw* (*t*), clearly recognizes the authority of the Chief Baron's decision, and explains it by observing that the cider-mill was to be considered as properly an accessory to the trade of making cider.

Privilege in
favour of
trade.

The above-mentioned decision is the only one to be found in which it has been expressly held that the exception on the ground of trade operates in favour of the personal estate against the claim of the heir (*u*). It was,

(*q*) 3 Atk. at p. 15.

(*r*) Bul. N. P. 34.

(*s*) 3 Esp. 11.

(*t*) 3 East, at p. 54.

(*u*) In *Stuart v. Earl of Bute*, 3 Ves. 212; 11 Ves. 656, a testator gave all his waggon-ways, &c., and all implements, utensils, and things used for

the working of his collieries, and which might be deemed as of the nature of personal estate, to be held with the collieries. Under this bequest, fire-engines (among other things) were considered to pass. But it does not appear that the question as to

however, generally regarded as a valid authority; and was Chap. IV. s. 1.
 considered to have introduced a rule somewhat restraining
 the rigour of the ancient law, and establishing that in
 certain cases erections for the purpose of trade may be re-
 moved by the executor as part of the owner's personal
 assets. Both Lord Hardwicke and Lord Ellenborough
 seem to have been of this opinion. For in the case just
 cited, of *Lawton v. Lawton*, Lord Hardwicke observes, "It
 "is true the old rules of law have indeed been relaxed
 "chiefly between landlord and tenant and not so frequently
 "between ancestor and heir at law, or tenant for life, and
 "remainder-man." And with reference to the fire-engines Fire engines
in collieries.
 in collieries, he says, "I think even between ancestor and
 "heir, it would be very hard that such things should go in
 "every instance to the heir." And Lord Ellenborough
 in *Elwes v. Maw*, appears to have considered, that the
 question whether property in dispute was part of the real
 or the personal estate depended on the point whether it
 was properly accessory to the realty, or was the means or
 instrument of carrying on a trade. And although the
 reasons assigned by these learned judges for the exception
 in favour of trade differ in some respects (c), yet it may
 be observed that neither of them intimate that the prin-
 ciple of the exception is less applicable to the case of
 ancestor and heir than to that of any other parties.

Again, in the case of *Trappes v. Harter* (u), Lord Lynd- Trappes v.
Harter.
 hurst, C. B., with reference to the property there in dispute,
 viz., machinery set up in calico-printing works, observes,
 that it was clear that as between landlord and tenant it
 might be removed by the tenant, if put there by him;
 "as between heir and executor, it would have passed to
 "the executor. . . . In *Lawton v. Lawton*, which was the

the fire-engines was viewed in the case relating to other
 with reference to the law of property.
 fixtures, the principal point

(c) See ante. p. 53.

(u) 2 Cr. & M. 153, 180.

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“ case of a fire-engine in a colliery, Mr. Wilbraham compared it to the case of a cider-mill, which is let very deep into the ground, and is certainly fixed to the freehold; and yet Lord Chief Baron Comyns, upon an action of trover brought by the executor against the heir, was of opinion that it was personal estate, and directed the jury to find for the executor.” And after referring to the case of *Laulton v. Salmon* (x), and to that of *Elwes v. Mau*, his Lordship adds, “ Applying these authorities to the present case, we think that this machinery, erected for the purposes of trade, in a neighbourhood where machinery of such description is commonly removed, and which was capable of removal without injury to the freehold, is not to be considered as belonging to the inheritance, but as part of the personal estate.” These learned judges, therefore, as also Mr. Justice Buller and Lord Kenyon, as already noticed, all concur, both in admitting the validity of the decision respecting the cider-mill, and in assigning the principle upon which they consider this exception in favour of the personal estate to be founded. Moreover, Lord Blackburn appears to have alluded to the above cases in the course of his judgment in a very recent decision, where he states that “ there are cases deciding that some chattels so annexed to the land, as to be, whilst not severed from it, part of the land, are removable by the executor as between him and the heir ” (y).

Fixtures for trade and other objects combined.

According to this view of the authorities, it would appear that there is a further inference to be drawn from the decision respecting the cider-mill, in conjunction with the instances with which it is classed by Lord Hard-

(x) 1 H. Bl. 260, *in notis*.

(y) *Wake v. Hall*, 8 App. Cas. at p. 204. His lordship in this case referred to the opinion of Lord Ellenborough,

that the privilege is based upon the fact of the article being accessory to a matter of a personal nature. As to this see *ante*, p. 53.

wicke of the steam-engines in a colliery ; that is to say, Chap. IV. s. 1. that the executor would be entitled to remove articles of a similar description, where they are erected for a purpose in which both trade and the profits of land are combined. Lord Hardwicke, speaking of the cider-mill, says, that it is an extremely strong case, for “ though cyder is part “ of the profits of the real estate, yet it was held by Lord “ Chief Baron Comyns, a very able common lawyer, that “ the cyder-mill was personal estate notwithstanding, and “ that it should go to the executor.” Lord Ellenborough also remarks, that it is “ a mixed case between enjoying “ the profits of land and carrying on a species of trade.” It is material to attend to this circumstance ; because, considered in this view, these several authorities point out two distinct classes of fixtures, which are to be deemed part of the testator’s personal estate ; and which it will at once be perceived are the same species of things as those which are considered to form personal estate in the case of a deceased tenant for life or in tail (z).

Even admitting, however, that a relaxation from the general rule of law has been sanctioned to a certain extent by the ruling of Comyns, C. B., and the *dicta* of the learned judges as above cited, still there is no doubt that the exception contended for must be understood with considerable qualification. For it will be seen from the important decision of Lord Mansfield in the case of *Laurton v. Salmon*, that if the property in dispute is absolutely essential to the value and enjoyment of the real estate, it cannot be deemed part of the personal assets. And, moreover, by the decisions of the House of Lords already referred to, the validity of this exception in favour of the personal estate on the ground of trade, is still further weakened, if not altogether impugned.

These decisions, therefore, are now to be considered. In *Laurton v. Salmon*, before Lord Mansfield (a), an action

Validity of executor’s privilege considered.

Things accessory and essential to the realty not removable.

(z) See *ante*, p. 171.

(a) 1 H. Bl. 260, *in notis*.

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of trover was brought by an executor against a tenant of the heir, to recover certain vessels called salt-pans, which were used in salt-works, and had been erected by the testator in his lifetime. Upon a case reserved by consent, it appeared that the salt-pans were made of hammered iron, and riveted together. They were brought in pieces, and might be again removed in pieces; and they were not joined to the walls, but were fixed with mortar to the brick-floor. There were furnaces under them, and space for the workmen to go round; there were no rooms over them, but there were lodgings at the end of the wych-houses. It appeared also that they might be removed without injuring the buildings, though the salt-works would be of no value without them; which, with them, were let for 8*l.* per week (*b*).

Judgment in
Lawton v.
Salmon.

Lord Mansfield, in pronouncing the judgment of the Court, after referring to the cases between landlord and tenant and tenant for life and remainderman, proceeded thus:—"But I cannot find that between heir and executor
"there has been any relaxation of this sort, except in the
"case of the cider-mills, which is not printed at large.
"The present case is very strong. The salt spring is a
"valuable inheritance, but no profit arises from it, unless
"there is a salt-work, which consists of a building, &c., for
"the purpose of containing the pans, &c., which are fixed
"to the ground. The inheritance cannot be enjoyed with-
"out them: they are accessaries necessary to the enjoyment
"and use of the principal. The owner erected them for
"the benefit of the inheritance: he could never mean to
"give them to the executor, and put him to the expense
"of taking them away, without any advantage to him,
"who could only have the old materials, or a contribution
"from the heir, in lieu of them. But the heir gains 8*l.*
"per week by them. On the reason of the thing, there-

(*b*) See the description of salt-pans in *Earl of Mansfield v. Blackburne*, 6 Bing. N. C. 426.

“ fore, and the intention of the testator, they must go to
 “ the heir. It would have been a different question if the
 “ springs had been let, and the tenant had been at the
 “ expense of erecting these salt-works: he might very
 “ well have said, ‘I leave the estate no worse than I
 “ ‘found it.’ That, as I stated before, would be for the
 “ encouragement and convenience of trade, and the benefit
 “ of the estate. For these reasons, we are all of opinion
 “ that the salt-pans must go to the heir.”

Chap. IV. s. 1.

From the expressions used by Lord Mansfield in this case it appears, that although the right of the heir was treated as a paramount one in general, the decision of the case turned rather upon the circumstance of the erection in question being accessory to the realty, than upon the unbending nature of the heir's claim. For Lord Mansfield dwells strongly upon the circumstance that the salt-pans were erected for the enjoyment of the estate, and as the proper means of deriving the profits of the land (c). It is according to this view of the subject that Lord Ellenborough (d) explains the decision, and endeavours to distinguish it from the case of the cider-mill and other cases which fall within the class of trade fixtures. He says, “ Lord Mansfield does not seem to have considered the salt-pans as accessory to the carrying on a trade, but as merely the means of enjoying the benefit of the inheritance.” Upon this principle he considers them as belonging to the heir, as parcel of the inheritance for the use of which they were made, and not as belonging to the executor as the means or instrument of carrying on a trade. So, too, Lord Blackburn in *Wake v. Hall* (e) remarks, “ Whenever the chattels have been annexed to

Lawton v. Salmon
considered.

(c) It is observable that Lord Mansfield in his judgment refers to several distinct grounds of decision, such as the intention of the party in making the erection, and the

comparative value of the property to the respective claimants.

(d) *Elwes v. Mair*, 3 East, at p. 54.

(e) 8 App. Cas. at p. 204.

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“ land for the purpose of the better enjoying the land
 “ itself, the intention must clearly be presumed to be to
 “ annex the property in the chattels to the property in
 “ the land, but the nature of the annexation may be such
 “ as to shew that the intention was to annex them only
 “ temporarily.”

Comparison
 with the
Cider-mill
case.

It does not, indeed, appear by what criterion cider-mills, salt-pans, or any other similar articles which are plainly connected both with trade and the profits of land, are to be deemed accessory to the one or the other purpose exclusively. And it is in this particular that the difficulty of reconciling the decisions in question consists. Perhaps it may be thought that the cider-mill was not so indispensably necessary to the value and enjoyment of the principal as the salt-pans; because the produce of the fruit trees might be rendered to a certain degree profitable without the manufacture of cider; whereas the brine could not be available at all but by the instrumentality of the salt-pans, and the inheritance would have been of no value without the annexation. And this distinction, it may be recollected, is similar to that relied upon by Lord Hardwicke on another occasion (*f*). For he assigned as a reason why the fire-engines should not pass to the remainderman, that the colliery might be worked without them, although perhaps more advantageously with them; the enjoyment of the estate with or without the engines being only a question of *maius* and *minus*. It must be confessed, however, that these distinctions are very refined; and many cases may occur where their application would be attended with much difficulty, and where it might be almost impossible to pronounce what is the precise nature and object of an erection. Thus, it would have been very difficult to have concluded, *a priori*, that the manufacture of cider, or the working of a colliery, were not so far the means of enjoying the benefit of the

Difficulty in
 saying what
 is precise
 object of
 erection.

(*f*) *Lawton v. Lawton*, 3 Atk. at p. 15.

inheritance, as to bring them within the principle laid down in the case of *Laulton v. Salmon* (g). And on the other hand, it is almost impossible to say that trade was not in some measure pursued by the instrumentality of the salt-pans. Indeed all that can be said upon this subject is, that perhaps these articles were more connected with land and less with trade than the cider-mill; and that in erecting and using them, the consideration of enjoying the profits of land predominated over the intention of following a trade, more in the one case than it did in the other.

Although, therefore, the case of *Laulton v. Salmon* must be taken to depend, in some measure, on its own peculiar facts, still the decision must be deemed greatly to weaken the effect and to narrow the extent of the indulgence which the ruling of Chief Baron Comyns would have established. Indeed, it is apparent from Lord Mansfield's expressions, that he himself entertained doubts upon the validity of the latter decision. For he observes that it is a solitary determination at *Nisi Prius*; and (according to the report in 3 Atk. 16, *in notis*) he conjectured that it was probably founded upon custom (h).

Effect of
Laulton v.
Salmon upon
Cider-mill
case.

But the case of *Fisher v. Dixon* (i) is next to be considered. And in this case not only is the decision as to

(g) As to which, see *per* Lord Mansfield, in *Wells v. Parker*, 1 T. R. 34, 38. And see the instances referred to in the case of *Heane v. Rogers*, 9 B. & C. 577, 588, in a question whether brick-making was within the bankrupt laws then in force.

(h) In Comyns' Digest, tit. Biens (B.) the Chief Baron lays it down, that mill-stones go to the heir: from whence it might perhaps be inferred

that his opinion was, that, in general, mills were part of the inheritance, and could not be separated from it. See also *R. v. Crosse*, Sid. at p. 207, where it is said to have been held by Fenner and Clench, JJ., that the sails of a wind-mill go as parcel of the freehold of the mill to the heir, and not to the executor. As to removing windmills, see *ante*, p. 4, note (k).

(i) 12 Cl. & F. 312. And

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Dixon.*

the cider-mill treated as too doubtful in its circumstances to be relied upon as an authority, but, as before observed, the principle itself on which it is supposed to have proceeded, viz. the encouragement to be afforded to trade, which has been so frequently applied to the solution of similar cases, is declared not to be applicable to ordinary questions between heir and executor in the circumstances presented by this case. It was an appeal to the House of Lords against a decree of the Court of Session of Scotland, arising out of the following case :—J. Dixon was an extensive coal and iron mine owner, and was at the time of his death engaged in working mines, which were his freehold property (*k*). A very valuable portion of his property consisted of engines, colliery utensils, rails, &c., employed in the business he carried on. After his decease a question was raised whether these engines, machinery, &c., were to be considered heritable property, and to pass with the estate to the heir, or moveable property, and belonging to the executors.

The Lord Ordinary, before whom the cause was appointed to be heard, referred it to one, and afterwards to a second referee, to report as to the nature of the property. The second referee described all the machinery as capable of being moved and replaced, but said that the removal would be very expensive; that it would more or less deteriorate the value of the machinery; that for that reason machinery was often left by the tenant, and its value made a matter of arrangement between him and the landlord; and that some parts, such as the steam engine for pumping the mines, must, if removed, be instantly replaced, or very serious damage would arise to the mines. He also referred to the practice of the country, and said,

see the report of the same case in 4 Bell's App. Cas. 286, where the proceedings, before the Courts in Scotland and the able judgments pronounced

there, are given at length. See also 5 D. 775.

(*k*) There was also some leasehold property, as to which see *post*, p. 233.

that the practice at coal and iron works, similar to those of the deceased, was to remove the mechanism of the engine, and other machinery, from one part of the premises to another, as occasion required. The practice also was for the tenant, at the termination of a lease, to remove the whole of such engines and machinery, if not previously belonging to the landlord. And in the event of the exhaustion of the mineral field, or any permanent bar arising to the profitable working of the minerals, the whole of the engines and machinery was removed by the tenant, or worker of the field, or by the proprietor, if his property.

Chap. IV. s. 1.

*Fisher v.
Dixon.*

The case was afterwards further debated before the Lord Ordinary; and accounts and inventories were put in, from which it appeared that the steam-engines and rails were treated and described by the testator as moveable property, but the lands as heritable. The Lord Ordinary referred the case as one of difficulty to the Lords of the Second Division; and their Lordships determined to consult the Lords of the First Division, and the permanent Lords Ordinary. The majority of their Lordships finally expressed an opinion to the effect, that the machinery which was fixed to the soil, and could not be used without being so fixed for the purpose of the profitable use of the land, was heritable (1).

Decision of
Court of
Session in
*Fisher v.
Dixon.*

From this decision there was an appeal to the House of Lords. On the hearing of the appeal, it was argued for the appellant, that this machinery employed by the testator to work the mines was used by him in the course of his trade, and therefore fell within the principle of law, which in favour of trade treats such articles as personal

Arguments in
House of
Lords.

(1) But their Lordships decided that the tools employed in connection with the machinery, but not necessarily affixed thereto, and capable of

being employed elsewhere in the same manner, and parts of machinery prepared for fixing but not actually affixed, were moveable. See *ante*, p. 21.

Part I.

property. The case of the cider-mill, and those of *Lawton v. Lawton*, and *Lord Dudley v. Lord Warde*, were relied upon as establishing that proposition. *Lawton v. Salmon* was distinguished on the ground that the salt-pans were a necessary part of the estate itself, which without the pans would be almost useless to the owner. They were accessories to the necessary enjoyment of the inheritance; but the machinery in the present case was an accessory, not to the enjoyment of the estate, but to the carrying on of the testator's trade; and the expressions of Lord Ellenborough in *Ellice v. Mau*, as to a thing being an accessory to a matter of a personal nature, were also cited. For the respondents it was urged, that the machinery in question rendered the land capable of profitable employment, and was erected for this sole object, and for the better enjoyment of the estate. The case of *Lawton v. Salmon* was much relied upon, and it was urged that the facts of the *cider-mill case* were too imperfectly known to be considered an authority. It was, moreover, insisted, that the principle of the convenience of trade applied only to cases where the erections were not made for the better enjoyment of the land, but merely for the purposes of trade; and where such erections were put up by persons having only a transitory interest in the land, and where they are claimed by the creditors of those persons.

Opinion of
Lord Brough-
am in *Fisher*
v. Dixon.

The judgment was pronounced at a subsequent period. Lord Brougham said, that, upon the fullest consideration he had been able to give both to the English and the Scotch authorities which were cited, he entirely agreed with the majority of the Court below. He observed, "Great reliance was of course placed upon the case before
" Lord Hardwicke in our Court of Chancery here, and a
" similar case which occurred in the Court of Exchequer,
" I think in Lord Lyndhurst's time (*m*). But there was

(*m*) *Trappes v. Harter*, ante, p. 219.

“ an attempt made to distinguish this case in principle
 “ from that, and to show that there was another incon-
 “ sistent decision in the cider-mill case. Now it is a re-
 “ markable circumstance, that of that case we have only a
 “ very indistinct and unsatisfactory report. We have
 “ really nothing that can be called a record of that case.
 “ It was cited in the case before Lord Hardwicke; and I
 “ must also say, that if the cider-mill case is to be taken
 “ as it is represented to us, as regards the substance of the
 “ case, and in its result, my mind goes not at all with
 “ that decision. It is contrary, undeniably, to the general
 “ principles of our law upon the subject; and if the same
 “ question were to arise to-morrow, with the circumstances
 “ which are represented to have attended that case, it would
 “ not, in my opinion, lead to the same result. Therefore
 “ I lay it out of view. We have a most imperfect account
 “ of the circumstances, and above all, of the most material
 “ circumstances, of how the mill was affixed to the soil.
 “ For if a cider-mill be fixed to the soil, though it is a
 “ manufactory, and erected for the purpose of a manufac-
 “ tory, if it is really *solo infixum*, it is perfectly immaterial
 “ whether it is for the purpose of a manufactory, or a
 “ granary, or a barn, or any thing else (n). It is a fixture
 “ on the soil, and it becomes part of the soil (o). Can any
 “ man say that one of the great brewhouses would belong
 “ to the executor, because it is erected for the purpose of a
 “ manufacture, and wholly unconnected with the land?”
 His Lordship therefore recommended that the judgment
 of the Court below should be affirmed.

Chap. IV. s. 1.

Opinion of
 Lord Broug-
 ham in *Fisher*
v. Dixon.

(n) See the remarks of
 Wood, V.-C., in *Mather v.*
Fraser, 2 K. & J. at p. 545.
 In that case the Vice-Chan-
 cellor was of opinion that all
 the articles in question, which
 were fixed to the freehold
 whether by screws, solder, or
 any other permanent (or, ac-

cording to the report in 25 L.
 J., Eq. 361, 363, “*quasi per-*
manent”) means, or by being
 let into the soil, were within
 the authority of *Fisher v.*
Dixon, partook of the nature
 of the soil, and *would have*
descended to the heir.

(o) See *ante*, p. 28.

Part I.

Opinion of
Lord Cotten-
ham in *Fisher*
v. *Dixon*.

Lord Cottenham, after some preliminary observations, said, "The principal stress of the argument on the side of the appellant has been, that this is to be protected, because it is necessary for the encouragement of trade, that this property should be considered as not belonging to the real estate, but as belonging to the personal estate. The principle upon which a departure has been made from the old rule of law in favour of trade, appears to me to have no application to the present case. The individual who erected the machinery was the owner of the land and of the personal property, which he erected and employed in carrying on the works; he might have done what he liked with it; he might have disposed of the land; he might have disposed of the machinery; he might have separated them again. It was, therefore, not at all necessary, in order to encourage him to erect those new works which are supposed to be beneficial to the public, that any rule of that kind should be established, because he was master of his own land. It was quite unnecessary, therefore, to seek to establish any such rule in favour of trade as applicable here, the whole being entirely under the control of the person who erected this machinery (*p*). If, therefore, this be clearly a question of real or personal estate, and if the rule, which in some cases has been acted upon, of making a departure from the established principle in favour of trade, has no application to the present case, what does it come to? Of course we throw out of consideration all the cases which have arisen between landlord and tenant, and between tenant for life and remainder-man, because the departure which has taken place there, in some cases, has no application to the present case. Then the case being simply this, the absolute owner of the land, for the purpose of

(*p*) See *Mather v. Fraser*, 5 Q. B. at p. 136. And see 2 K. & J. at p. 548; *Climie v. Wood*, L. R., 4 Ex. at p. 330; *Longbottom v. Berry*, L. R., 5 Q. B. at p. 136. And see *Holland v. Hodgson*, L. R., 7 C. P. 328.

“ better using that land, having erected upon and affixed
 “ to the freehold, and used, for the purpose of the beneficial
 “ enjoyment of the real property, certain machinery, the
 “ question is, is there any authority for saying, that, under
 “ these circumstances, the personal representative has a
 “ right to step in and lay bare the land, and to take away
 “ all the machinery necessary for the enjoyment of the
 “ land? Let us consider for a moment, if that is the
 “ principle, to what extent is it to go. It is put by Lord
 “ Cockburn (*q*) (and a very strong illustration it is), if
 “ the owner of the land should dig a well, and erect
 “ machinery for the purpose of using that well, is it
 “ competent to the personal representative to come and
 “ take away that machinery, and leave the well useless?
 “ He thinks it is not. Where is the distinction between
 “ the two cases? Such machinery is capable of being
 “ taken away with very little, if any, damage to the
 “ land. Although, therefore, machinery is in its nature,
 “ generally, personal property, yet, with regard to ma-
 “ chinery, or a manufactory erected upon the freehold for
 “ the enjoyment of the freehold, nobody can suppose that
 “ that can be the rule of law; and so with respect to
 “ other erections upon land (*r*). It is not necessary to go
 “ beyond the present case, which is a case of machinery
 “ erected for the better enjoyment of the land itself. The
 “ principle probably would go a great deal farther; but it
 “ is more advisable to confine the observations I have to
 “ make to the particular circumstances of this case. There
 “ is no case whatever which has been cited in which that
 “ doctrine has been recognized, except the one which has
 “ been referred to (*The Cider-mill case*), as to which we
 “ really know nothing, except that at the Worcester
 “ assizes, a good many years ago, a cider-mill was held to

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 Opinion of
 Lord Cotten-
 ham in *Fisher*
v. Dixon.

(*q*) In the Court of Session, *Longbottom v. Berry*, L. R.,
 4 Bell's App. Cas. at p. 300. 5 Q. B. at p. 137; *Holland v.*
 (*r*) See *Walmsley v. Milne*, *Hodgson*, L. R., 7 C. P. at
 7 C. B., N. S. at p. 136; p. 338.

Part I.

Opinion of
Lord Cotten-
ham in *Fisher*
v. *Dixon*.

“ belong to the personal estate. Why it was so held,
“ under what circumstances, and whether it was a cider-
“ mill fixed to the freehold or not, we do not know. We
“ know nothing except that this machine, called a cider-
“ mill, was decided to go to the personal representative.
“ It is impossible to extract a rule of law from a case of
“ which we know so little as that. And, with that ex-
“ ception, there is a uniform course of decisions, wherever
“ the matter has been discussed, in favour of the right of
“ the heir to machinery erected under the circumstances in
“ the present case ; and if the *corpus* of the machinery is
“ to be held to belong to the heir, it is hardly necessary to
“ say, that we must hold that all that belongs to that
“ machinery, although more or less capable of being used
“ in a detached state from it ; still, if it belongs to the
“ machinery, and belongs to the *corpus*, the article, what-
“ ever it may be, must necessarily follow the same prin-
“ ciple, and remain attached to the freehold.” His Lord-
ship, therefore, was of opinion that the judgment should
be affirmed.

Opinion of
Lord Camp-
bell in *Fisher*
v. *Dixon*.

Lord Campbell also concurred in the same view of the
case ; and said, he had no doubt in the world that the
property in dispute should go to the heir both upon
reason and upon precedent. That “ none of the argu-
“ ments respecting the benefit of trade at all apply to a
“ question as between heir and executor, in a case like
“ this where the owner of the fee being the absolute owner
“ of the land, and of the machinery erected upon it, the
“ whole of it is in him, and he may dispose of it as he
“ shall think fit for the benefit of the family. Then with
“ reference to the authorities by which we are bound ;
“ whatever speculative notions we might entertain with
“ respect to propriety and expediency, if we entertained a
“ different opinion upon that subject, all the cases are
“ quite uniform both in England and in Scotland to show
“ that such property shall go to the heir. The only case

“ the other way which has been referred to is that of the
 “ cider-mill, where the essential circumstance is left en-
 “ tirely in doubt, whether, in fact, the mill was fixed to
 “ the freehold or not ” (s). The interlocutor was therefore
 affirmed with costs.

Chap. IV. s. 1.

Opinion of
 Lord Camp-
 bell in *Fisher*
v. Dixon.

In the above case there was a subsidiary point with re-
 ference to machinery upon other mines, of which J. Dixon

Law of Scot-
 land as to
 machinery
 upon *leasehold*
 premises.

(s) His Lordship then pro-
 ceeds to show that the cider-
 mill might have been a mere
 moveable by citing the fol-
 lowing instance: he says,
 “ We know that a cider-mill
 “ is not necessarily affixed to
 “ the freehold, a familiar in-
 “ stance of which is given in
 “ the Vicar of Wakefield;
 “ where, when a match was
 “ proposed between one of the
 “ Misses Primrose and young
 “ Farmer Flamstead, Moses
 “ said, ‘ I hope that if my sis-
 “ ‘ ter marries young Farmer
 “ ‘ Flamstead, he will lend us
 “ ‘ his cider-mill.’ I take it
 “ that the cider-mill there was
 “ moveable, and was not af-
 “ fixed to the freehold, but
 “ might have been carried
 “ from the farm of Farmer
 “ Flamstead to the vicarage
 “ of the Primroses.”—The
 reader will probably be of
 opinion that this illustration
 of the learned judge hardly
 meets the case; and that the
 longings of Moses might have
 been fully gratified, and the
 cider-mill left in its proper
 and fixed place. In the cider
 counties it is the constant prac-
 tice of the smaller fruit grow-
 ers to carry their fruit to be
 ground and pressed.

bouring mill; since to carry
 the mill to the fruit would be
 next to impossible: a small
 sum is frequently paid for the
 accommodation, the grower
 employing his own horse to
 work the machinery. It is no
 uncommon thing for a farmer
 to accommodate his neigh-
 bour with the loan of his
 barn, threshing-floor, or rick-
 staddle. And to lend a house
 to a friend, is an expression
 which scarcely implies that
 the house shall be moved from
 its site to complete the obli-
 gation. Certainly all the emi-
 nent authorities who have
 adopted and approved the de-
 cision of Comyns, C. B., ap-
 pear to have considered that
 the cider-mill in dispute was
 clearly affixed to the freehold,
 as it was expressly described
 to be when the case was first
 brought forward. Indeed the
 question could hardly have
 arisen at all had it been other-
 wise. From the very nature
 and construction of such mills
 and the heavy machinery by
 which they are worked, it
 would seem to be impossible
 that they could be used unless
 they were very deeply let into
 the soil.

Part I.

was lessee, the value of which, however, was comparatively insignificant. In regard to this class of machinery the decision of the Court of Session was, in point of form, that it formed part of the personal estate and did not go to the heir; and, there being no cross appeal by the heir in the House of Lords, no question was there raised and no decision given on this point. But in the subsequent case of *Bain v. Brand*. *Bain v. Brand* (*t*), which came before the House of Lords in 1876, this particular question presented itself for decision. There the Court of Session, considering themselves bound by the decision in *Fisher v. Dixon*, had decided that machinery, annexed by the lessee of a colliery, passed to his personal representative, although the lease itself, being by the law of Scotland a heritable subject, passed to the heir. But the House of Lords were of opinion that the case of *Fisher v. Dixon*, owing to its particular circumstances, could not be treated as a decision on this point, and, reversing the decision of the Court of Session, held unanimously that the machinery in question passed to the heir with the leasehold interest in the colliery.

Opinion of
Lord Cairns
in *Bain v.*
Brand.

Lord Cairns, C., referred to the two general rules of the law of fixtures,—viz., that whatever is fixed to the freehold becomes a part of it, and that whatever once becomes a part of the freehold cannot be severed by a limited owner without the commission of waste—and said, that to the first rule there was, so far as he was aware (*u*), no exception, but that to the second, an exception had been established in favour of a tenant. His Lordship continued, “What extent of removal the executor of one who is not
“ a tenant, but is a complete owner of the inheritance,
“ may have as against the heir, whether in point of fact
“ he has any right of removal at all, or any right to take
“ more than that which really and properly considered
“ was never fixed to the inheritance in a definite way, I

(*t*) 1 App. Cas. 762.

(*u*) See *ante*, p. 28.

“ need not stop to consider, because the case of *Fisher v. Dixon* has clearly decided by the authority of your Lordships, that fixtures of the kind now before your Lordships cannot be removed by the executor of one who is complete owner of the inheritance. Therefore your Lordships have upon the one hand the rule as laid down in the case of *Fisher v. Dixon*, that fixtures of the present kind cannot be removed by the executor as against the heir of the complete owner of the inheritance, and you have on the other hand the exception to which I have referred, that fixtures of this kind can be removed by the executor of a tenant, or by the tenant himself as against the landlord during the course of the tenancy. . . . There is certainly no authority for saying that the executor can remove these fixtures as against the heir. In my opinion there is no principle in the rules which I have endeavoured to express which can warrant that right of removal. These things which I have termed fixtures are *ex hypothesi* annexed to the inheritance at the time of the death of the tenant. Thereupon the heritable subject, namely, the lease, at once passes to his heir” (*i.e.* by the law of Scotland, see *supra*). What right has the executor, or how is that right founded, to come upon the heritable subject which has passed to the heir, and to strip it of those things which have become fixed to it? There is no doubt, *ex hypothesi*, a right to remove these fixtures as against the landlord, but who is the person to exercise that right? It is not a right in gross, it is not a right collateral to the ownership of the subject; it is a right which of necessity must be annexed to the ownership of the subject, and must be exercised by him who is the owner of the subject. But the owner of the subject is not the executor. The owner of the subject is the heir, and therefore, as it seems to me, your Lordships are obliged to consider the person to whom the subject itself has passed, and to hold the right which is annexed to that subject to be exerciseable by that person, and by that person only.”

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Opinion of
 Lord Cairns
 in *Bain v.*
Brand.

Tenant's right
 of severance
 not a right in
 gross.

Part I.

Opinion of
Lord Chelms-
ford in *Bain*
v. *Brand*.

Lord Chelmsford, after alluding to the facts of the case, and saying that the general law as to fixtures is the same in Scotland as in England (*u*), continued: "A question between landlord and tenant as to fixtures can rarely arise except with regard to the description of those which the tenant claims the right to remove. But the present question is between heir and executor, and depends upon the character of the fixtures whether they are part of the realty or not. The lease itself is admittedly realty. The fixtures were annexed to the soil by the owner of that realty. If he had been owner in perpetuity, there would have been no doubt that the fixtures would have been part of the inheritance. Can it make any difference that he was owner for a limited period? He was as absolute owner of the realty during that period as if he had had it for ever. The fixtures were annexed to the ground for use during the whole term of enjoyment of the heritable subject. There is nothing in the terminable character of the lease at different periods that can affect the question, for as long as it continues it preserves its heritable character."

Opinion of
Lord
O'Hagan in
Bain v. Brand.

Lord O'Hagan, in the course of his opinion to the same effect, said: "There has been no dispute about the law, which is the same in England as in Scotland, and has been so from very early times, giving to the heir machinery fixed and attached to the soil. If the property had been, in this case, freehold, there could have been no controversy as to the application of the rule. The executor could not have been heard to contest the claim of the heir . . . Settled exceptions exist in the interest of trade, and from the exigencies of social life, as between tenants for life or in tail and remainderman, and as between landlords and tenants. But there is no ground for such a relaxation of the strict law, and there has been no such relaxation, in fact, as can avail the

(*u*) And see per Lord O'Hagan, *S. C.*, 1 App. Cas. at p. 77^c

“ respondents in their attempt to abridge the rights of the
 “ heir when he succeeds to the leasehold as well as to the
 “ feu. The principle which underlies the rule of law has
 “ been properly said to be that machinery attached to
 “ the land follows it as its accessory in the case of the
 “ freehold—the land is heritable, and so are the fixtures;
 “ and why, having a like attachment, should not the
 “ machinery going with a leasehold which is heritable
 “ become accessorially heritable also? I see no sufficient
 “ reason, in the absence of authority, for holding it
 “ moveable in one case and heritable in another.” Lord
 Selborne expressed his concurrence in the foregoing
 opinions, and the interlocutor appealed from was therefore
 reversed.

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Opinion of
 Lord
 O'Hagan in
Bain v. Brand.

The above case has made it clear that, as between the
 heir and the personal representative, there is no distinction
 between the position of the heir of an owner in fee and
 that of the heir to any other estate of inheritance, the
 latter being, during his interest in the property, as absolute
 an owner as if the estate lasted for ever.

No distinction
 between heir
 of owner in
 fee and heir of
 any other es-
 tate of in-
 heritance.

In view of the above decisions in *Fisher v. Dixon* and
Bain v. Brand in the House of Lords, it must be con-
 sidered as extremely doubtful, at the present day, whether
 an executor of an owner in fee has in fact any right,
 as against the heir, to fixtures put up for trade purposes.
 For although it is to be observed that these decisions
 did not, in terms, extend to fixtures other than those
 annexed for the better enjoyment of the land itself, and
 Lord Cottenham (v) expressly limited his opinion to this
 class of fixtures, whilst Lord Cairns (w) as expressly de-
 clined to consider whether or not the executor had any
 right of removing fixtures at all, yet a careful considera-
 tion of the grounds upon which the decisions in those
 cases are based, seems to lead to the conclusion that the

Semble, exe-
 cutor not
 entitled to
 trade fixtures
 as against
 heir.

(v) *Supra*, p. 231.

(w) *Supra*, p. 234.

Part I.

heir is in all cases entitled to trade fixtures, whether they are annexed for the mere purpose of more profitably enjoying the land, or are used for a purpose collateral to and independent of its enjoyment (*x*). Moreover, the authority of some of the judicial opinions in favour of the rights of the executor, is not a little weakened by observing the contradictory expressions which are to be found in them. For the same judges who have unhesitatingly admitted the authority of the *cider-mill case*, and appear to consider it reasonable that the strict rule of law should be relaxed between ancestor and heir, have, in delivering their opinions, not merely drawn a distinction as to the degree of indulgence to be shown to the executor's claims, but have laid it down in express terms, that the general rule still obtains in its former strictness whenever the heir and the real estate are concerned.

Contradictory
expressions
upon the rule
between heir
and executor.

This is observable of some of Lord Hardwicke's expressions. For, in *Lord Dudley v. Lord Warde*, in alluding to the exception which prevails in the case of landlord and tenant, he says, "But this does not hold between the "heir and executor" (*y*). Again, he says, in *Ex parte Quincy* (*z*), "The rule as to fixtures, as between an heir "and executor, is another thing; the freehold descending "on the heir, the executor cannot enter to take away "fixtures without being a trespasser. But there is "another rule between landlord and tenant." In like manner Mr. Justice Buller (*a*) remarks, that "the general "rule of law is, that whatever is fixed to the freehold

(*x*) But see per Lord Cranworth, C., delivering the judgment of the Court in *Ex parte Barclay, In re Gawan*, 5 D., M. & G. 403, 408; and per Lord Blackburn in *Wake v. Hall*, 8 App. Cas. at p. 204.

(*y*) Amb. 113. And see Lord Hardwicke's observa-

tions respecting the fire-engines, in the second question discussed in this case, and upon which Lord Talbot had pronounced an opinion, S. C. at p. 114.

(*z*) 1 Atk. 477.

(*a*) Bul. N. P. 34.

“ becomes part of it, and cannot be moved; but many
 “ exceptions have been admitted of late to this general
 “ rule as between landlord and tenant, or between tenant
 “ for life, or tail, and the reversioner: but the rule still
 “ holds as between heir and executor.” Yet it is evident
 that Mr. Justice Buller did not dissent from the decision
 of the *cider-mill case*, because he classes the mill among
 trade fixtures (b). And so, lastly, Lord Ellenborough,
 who, in *Eluces v. Maw*, distinctly recognizes the principle
 of trade as between heir and executor, yet sets out in his
 judgment in that case with saying, that the rule between
 these parties is the general rule, not subject to any ex-
 ception (c).

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In these circumstances it has been considered the more
 desirable course to present to the reader in the foregoing
 pages a comprehensive detail of all the cases and opinions
 which bear upon the subject, without attempting to lay
 down any rule as applicable to the solution of particular
 cases. It may, however, be remarked, that many of the
 arguments which have been adopted by the Courts in
 support of the claims of other classes of persons in
 questions of fixtures seem to be entitled to equal weight
 in the case of heir and executor. Thus, with regard to
 custom, it will be recollected that Lord Mansfield, in *Laulton*
v. Salmon (d), observed of the *cider-mill case*, that the
 decision might probably have been founded on that con-
 sideration. And it appears that in other instances between
 heir and executor, custom has been considered by the
 Courts to form a valid ground for the determination of

General ob-
servations.

Effect of
custom.

(b) And see his recognition
 of the case of *Harvey v. Har-
 rey*, as noticed in the next
 section. See *post*, p. 244.

(c) 3 East, at p. 51. And
 see the same position laid
 down by Lord Mansfield in
Laulton v. Salmon, 1 H. Bl.

260, *in notis*. See also *Lee v.*
Risdon, 7 Taunt. 191; *Winn*
v. Ingilby, 5 B. & Ald. 625;
Colegrave v. Dias Santos, 2 B.
 & C. at p. 77, per Bayley, J.;
R. v. St. Dunstan's, 4 B. & C.
 at p. 691, per Bayley, J.

(d) *Ante*, p. 225.

Part I.

such questions. Thus, in Viner's Abridgment (*e*), it is said to have been ruled by Eyre, C. B., at Winchester assizes, 1724, that in Hampshire a granary built on pillars was by custom of the county a chattel, and belonged to the executors. And so, in the case of *Louther v. Cavendish* (*f*), which respected the construction of a devise of certain lands and mines, a question was made whether the waggon-ways, staiths and fire-engines used in working the mines, passed along with the mines. And the Lord Keeper directed that it should be referred to the master to inquire whether the timber and other materials laid down for making the waggon-ways, and the fire-engines placed for the better working of the mines, were deemed and reputed in the county of Cumberland and other counties in the North, fixed to the freehold, and whether they passed therewith to the heir or remainderman, or went to the executor or administrator of the party erecting the same. With respect to these and other topics arising out of the facts of each particular case, the reader is referred to the observations in the concluding part of the section relating to trade fixtures between landlord and tenant (*g*).

Maxim that heir is to be preferred to executor.

It should be borne in mind on every occasion, that it is a general maxim of law, that in questions between an heir and an executor, the heir and the real estate are to be preferred; and that it is, moreover, a rule which has itself become almost a maxim, that the inheritance shall never be suffered to descend to the heir prejudiced or imperfect.

Things not actually fixed belong to the executor;

It is scarcely necessary to remind the reader, that if an article appears to be so constructed, that it is, in fact, not let into or united to the land or to any substance pre-

(*e*) Tit. Executors, p. 154.
 (*f*) 1 Ed. 99, 118. See also
Trappes v. Harter, 2 Cr. & M.
 at n^o 120 and ante, p. 219.

But see *Dixon v. Fisher*, 5 D.
 at p. 799, per Lord Cockburn.
 (*g*) Ante, p. 65.

viously connected therewith, it then remains in law a mere personal chattel, and as such belongs to the executor, whatever be the magnitude or character of the structure. Thus, where a windmill built of wood had a brick foundation in the ground, but the wood-work was not inserted into the brick-work, but rested upon it by its own weight alone, and no part of the machinery of the mill touched the ground or the foundation, it was held that the mill was not parcel of the freehold, and nothing more than a chattel; and Bayley, J., said, "In this case the windmill " would clearly have gone to the executor and not to the " heir" (*h*). This rule, however, must be understood as not applying to things which are in their nature incident to the realty, though not actually connected with it, as mill-stones, keys, &c., and other like objects referred to in a preceding page (*i*). In the case of *Fisher v. Dixon*, above cited, it was ruled, that if the *corpus* of machinery belonged to the heir, all that belongs to that machinery, although more or less capable of being detached from it, and more or less capable of being used in such detached state, must also be considered as belonging to the heir (*j*).

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Unless when
constructively
annexed.

- (*h*) *R. v. Otley*, 1 B. & Ad. Cas. at pp. 764, 778; *Mather v. Fraser*, 2 K. & J. at p. 559; *Ex parte Astbury*, L. R., 4 Ch. at p. 635. And see *ante*, p. 21.
 161, 165; *ante*, p. 2 *et seq.*
 (*i*) *Ante*, p. 214.
 (*j*) *Bain v. Brand*, 1 App.

SECTION II.

*Of the Right of the Executor to Fixtures put up for Ornament or Convenience.***Part I.**

HAVING, in the last section, considered how far the decisions of the Courts have proceeded in introducing a deviation from the general rule of law, as between heir and executor, on the ground of trade, it is in the next place to be inquired, whether the rule has been relaxed between these parties, in respect of articles which have no reference to trading purposes.

At common law the heir was entitled not only to erections which might be deemed essential additions to the inheritance, but to things that had been affixed to the testator's freehold for mere ornament, or for the general improvement of the estate, and notwithstanding they might be in themselves of a chattel and moveable nature. Thus, it will be recollected that it was said in the Year Books and other early cases that the executor should take nothing but what was properly in the nature of chattels; and that fixed furnaces, tables dormant, benches, the covering of beds, and the like, should go to the heir no less than the trees growing on the land, or the doors and timbers of the house (a).

Right of executor to fixtures for ornament, &c.

This principle is found to govern all the earlier decisions. But in progress of time, a more liberal construction of the rule appears to have been admitted between these parties. For about the beginning of the reign of Queen Anne, the Courts seem to have considered that articles fixed up

(a) See *ante*, p. 212.

merely as household furniture, or for purposes of common domestic convenience, should not be accounted strictly a part of the inheritance, but should go to the executor in the nature of personalty. Thus, in the case of *Squier v. Mayer*, in Chancery (*b*), it was held by the Lord Keeper, that a furnace, though fixed to the freehold and purchased with the house, and also hangings nailed to the walls, should belong to the executor, and not to the heir. And it is added in the report, that “this was so determined, “contrary to *Herlakenden’s case* (4 Co.), ‘*qu’il dit n’est ley* “‘*quoad præmissa.*’”

Chap. IV. s. 2.

Furnaces,
hangings.

This doctrine, however, seems to have been qualified in the subsequent case of *Cave v. Cave*, in the same Court (Trin. T. 1705), where the authority of *Herlakenden’s case* was again recognized (*c*). For upon a question whether some pictures belonged to the heir or to the executor, the Lord Keeper was of opinion, “that although pictures and “glasses, generally speaking, were part of the personal “estate (*d*), yet, if put up instead of wainscot, or where “otherwise wainscot would have been put up, they should “go to the heir (*e*). The house ought not to come to the “heir maimed and disfigured. *Herlakenden’s case*, wain- “scot put up with screws, shall remain with the freehold.” But there was another determination almost immediately after the foregoing case, which in its principle seems to carry the doctrine of *Squier v. Mayer* to a very considerable extent. A bill was filed in the Court of Chancery, upon a covenant made by a testator to convey a house and all things affixed to the freehold thereof. And the Lord Keeper held that hangings and looking-glasses fixed to the walls of a house with nails and screws, *there being no*

Pictures, pier-
glasses, &c.

Glasses fixed
with screws.

(*b*) Freem. Cas. Chy. 249. case, noted in Williams’ Executors, p. 743 (8th ed.).
(*c*) 2 Vern. 508; Law of Test. 343; 3 Bac. Ab. tit. Executors, p. 498; see the decree of the Court in this
(*d*) See *ante*, p. 8.
(*e*) As to wainscot, see *ante*, pp. 108, 119.

Part I.

wainscot underneath, were only matters of ornament and furniture, and not to be taken as part of the house or freehold. And he was of opinion that for this reason they were not within the testator's covenant (*f*). According, therefore, to this construction it may be inferred that, in the opinion of the Lord Keeper, hangings and glasses affixed with screws and nails, and even if put up in lieu of wainscot, are to be deemed part of the personal estate (*g*). For a covenant of this nature may properly be considered to pass to the covenantee every thing which an heir would take by descent.

Tapestry,
iron backs to
chimneys.

A decision proceeding upon similar principles occurred afterwards at common law. The litigating parties in this case were the heir and the executor of the deceased owner of the land, and the determination is expressly in favour of the personal estate. In the case of *Harvey v. Harvey* (*h*), in an action of trover brought by an executor against an heir, Lee, C. J., held that hangings, tapestry, and iron backs to chimneys, belonged to the executor, who recovered accordingly against the heir (*i*).

Of the above decisions it is to be observed, that the case of *Beck v. Rebow* has frequently been cited and approved of by the Courts on subsequent occasions. And the case of *Harvey v. Harvey* is expressly recognized as law by Mr. Justice Buller in his treatise on the law of Nisi Prius (*j*).

Decisions not
uniform as to
the executor's
claims.

The Courts, however, have in several more modern instances shown a very great reluctance to acquiesce in the

(*f*) *Beck v. Rebow*, 1 P. Wms. 94; 15 Vin. Ab. tit. Landlord and Tenant, 43. In *Birch v. Dawson*, 2 A. & E. 37 (cited *post*, p. 325), where there was a bequest of fixtures and fixed furniture, the Court of K. B. held that looking-glasses and a book-case

walls passed under the *latter* term. See, too, *Finney v. Grice*, 10 Ch. D. 13.

(*g*) But see *D'Eyncourt v. Gregory*, L. R., 3 Eq. 382, *post*, p. 245.

(*h*) 2 Str. 1141.

(*i*) As to hangings, see *ante*, p. 116, *in notis*.

(*j*) Bul. N.P. 34 a (7th ed.).

principle of these determinations. Lord Mansfield, in the case of *Laulton v. Salmon* (*k*), speaks as if the relaxation in favour of carrying away matters of ornament existed only as between landlord and tenant. And Lord Ellenborough appears to have been under the same impression (*l*). In a later case (*m*), also, it was said by the Court of King's Bench, that certain articles consisting of set pots, ovens, and ranges, affixed by the owner of a house, would go to the heir and not to the executor. And in another case (*n*), in which there was a question whether stoves, closets, shelves, brewing-vessels, locks, blinds, &c., passed to the purchaser of a house, upon a sale and conveyance of the house, the Court said that although some of the articles, viz. the stoves, cooling-coppers, mash-tubs, water-tubs, and blinds, might be removable as between landlord and tenant, yet they would not belong to the executor, but to the heir, and were as between those persons parcel of the freehold. And so in *R. v. St. Dunstan's* (*o*), it was said by Bayley, J., that stoves, grates, and cupboards, were parcel of the freehold, and though they might be removed by a tenant during the term, yet they would go to the heir and not to the executor. Again, as all the authorities show that the rights of the executor of an owner in fee as against the heir, are less extensive than those of the executor of the tenant of a particular estate against the remainderman, the case of *D'Eyncourt v. Gregory* (*p*), already referred to at length in a previous section, must clearly be regarded as an authority upon the present point, in respect of the articles which were there held not to be removable. It is evident from that case, that, in Lord Romilly's opinion, the executor of a tenant in fee would not be entitled to

Chap. IV. s. 2.

Set pots,
ovens, ranges.

Stoves,
closets,
shelves, &c.

Grates, cup-
boards.

Panelling,
pictures, &c.,
in panels.

(*k*) 1 H. Bl. 260, *in notis*.

(*l*) *Elwes v. Maw*, 3 East, at p. 53.

(*m*) *Winn v. Ingilby*, 5 B. & Ald. 625. And see *Mather v. Fraser*, 2 K. & J. at p. 550.

(*n*) *Colegrave v. Dias Santos*, 2 B. & C. 76, cited *post*, p. 275.

(*o*) 4 B. & C. at p. 691. As to cupboards, see *ante*, p. 110, *in notis*.

(*p*) L. R., 3 Eq. 382. *Ante*, p. 180.

Part I. remove panelling, or tapestries, or pictures in panels, although they might easily be removed and their places might be supplied with other articles.

General rule
very partially
relaxed.

According, therefore, to these authorities, the Courts seem to consider that the old rule of law has received only a very partial relaxation in the case of heir and executor. It is, however, material to observe that, in the cases before Lord Mansfield and Lord Ellenborough, the conflicting claims of the heir and executor did not come into discussion; and therefore, the effect of the decisions in favour of the personal estate was not particularly adverted to in their judgments. And so with respect to other of the cases referred to, the question as to the heir's claim arose only collaterally, and was not, as in *Squier v. Mayer*, and *Harvey v. Harvey*, the express subject of determination. There is indeed much uncertainty as to the real extent of the executor's claims in these cases; and as the authorities are so few in number, and appear, moreover, so contradictory to each other, it may be useful to see how these questions have been treated by the modern text-writers.

Opinions of
text-writers.

Mr. Justice Blackstone in his Commentaries (q), speaking of the doctrine concerning heirlooms, says, "On the other hand, by almost general custom, whatever is strongly fixed to the freehold or inheritance, and cannot be severed from thence without violence or damage, 'quod ab ædibus non facile rerellitur,' is become a member of the inheritance, and shall thereupon pass to the heir; as chimney-pieces, pumps (r), old fixed or dormant tables, benches, and the like." In Wooddeson's Vinerian Lectures, it is said (s), "There are many other things" [besides the writings relative to an estate in lands] "which appear to be of a personal or chattel kind, and which nevertheless shall descend to the heir, and not go to the

Chimney-
pieces,
pumps, &c.

(q) Vol. ii. p. 428.

p. 17.

(r) As to pumps, see ante,

(s) Vol. ii. p. 379.

“ executor. Such are things annexed and fixed to the
 “ freehold, which in some measure are necessary for the
 “ enjoyment of the inheritance, and which greatly contri-
 “ bute to its value, as wainscot in a house, and the posts
 “ and rails of an inclosure” (*t*). And, in Burn’s Eccle-
 siastical Law (*u*), in allusion to the case of *Harvey v.*
Harvey, it is observed that “ the law seemeth now to be
 “ held not so strict as formerly; and if these things can
 “ be taken away without prejudice to the fabric of the
 “ house, it seemeth that the executor shall have them: as
 “ tables, although fastened to the floor; furnaces, if not
 “ made part of the wall; grates, iron-ovens, jacks, clock-
 “ cases, and such like, although fastened to the freehold by
 “ nails or otherwise” (*v*).

Chap. IV. s. 2.

Wainscot,
posts, &c.

Tables, ovens,
jacks, clock-
cases, &c.

The result of the several opinions and authorities upon
 this subject appears to be, that there are some species of
 articles which, as being put up merely for purposes of
 ornament, or common domestic use, may be accounted part
 of the testator’s personal assets. And if the cases of *Squier*
v. Mayer, *Beck v. Rebow*, and *Harvey v. Harvey*, are to be
 considered still unimpeached, these decisions establish an
 important modification of the ancient doctrine, and seem
 to carry the exception almost as far as in the case of land-
 lord and tenant. Nevertheless, the observations of the
 judges in the several cases which have been referred to
 must be considered as restrictive of any *general* right to
 fixtures on the part of the executor: and it would seem
 that much of the reasoning upon which the decisions in
 the cases of *Fisher v. Dixon*, and *Bain v. Brand* (cited in
 the preceding section (*w*)), were founded, applies to the
 case of annexations made by the owner of the fee for pur-

General
observations.

(*t*) As to rails, fences, &c.,
see *ante*, p. 59.

(*u*) Vol. iv. p. 411 (9th ed.).

(*v*) As to *jacks* being parcel
of the freehold, see *R. v.*

Crosse, 1 Sid. at p. 207. As
to clocks, see *Parsons v. Hind*,
14 W. R. at p. 861, per Black-
burn, J.

(*w*) *Ante*, pp. 225, 234.

Part I.

poses of ornament or convenience, as strongly as to the case of annexations by him for purposes of trade. Indeed, it may, perhaps, be doubted whether the right of the executor extends to any articles other than those which properly considered have never been annexed to the inheritance in such a way as to lose their character of chattels (*x*). It may, at all events, be laid down as a clear rule in all cases (*y*), that if an article put up for ornament or convenience is so annexed to the freehold that the inheritance would be greatly deteriorated by its severance, it must be considered an essential part of the freehold, and the executor will not be entitled to take it as part of the personal estate (*z*).

(*x*) See *ante*, pp. 7, 179.
And see per Lord Cairns, C.,
in *Bain v. Brand*, 1 App. Cas.
at p. 767.

(*y*) See 3 Bac. Ab. tit. Exe-

cutors, p. 492.

(*z*) For other considerations
affecting the class of fixtures
treated of in this section, see
ante, p. 105.

SECTION III.

Of Charters, Heir-looms, Emblements, &c.

THERE are certain species of things connected with the subject of the present treatise, which, like fixtures, are of a very technical character, and partake partly of a real and partly of a personal nature. It is proposed to investigate the doctrine relating to property of this mixed nature. And as the questions to which it gives rise usually occur between heir and executor, the present seems the proper place for considering it. And first,

Chap. IV. s. 3.

OF CHARTERS.

Charters, or deeds relating to the inheritance, are the evidential muniments of the estate. They are, as Lord Coke expresses it, the *sineurs* of the land. On this account, the law provides that they shall always follow the land to which they relate, and shall vest in the heir, and pass to the alienee, as incident to the estate, *et ratione terræ* (a). Thus, if the land were forfeited, as for treason or felony, the charters or evidences which belonged to the land were also forfeited (b).

Charters pass with the land.

From this their strict relation to land they have even been accounted for some purposes not to be chattels (c). And, therefore, it is said, that if a man gives and grants *omnia bona et catalla*, his charters concerning his land shall

(a) Yr. Bks. 20 Hen. 7, p. 13; 21 Hen. 7, p. 26; Co. Lit. 6 a; *Liford's case*, 11 Co. at p. 50 b; Fitz. N. B. tit. De-tinue (G.); Com. Dig. tit. Charters (A.). See also *Lord Buckhurst's case*, 1 Co. 1; *Lord v. Wardle*, 3 Bing. N. C. 680.

(b) Staun. Pl. Cor. lib. 3, c. 26. Forfeiture for treason or felony was abolished by 33 & 34 Vict. c. 23.

(c) Noy, Max. p. 359 (9th ed.). See 2 Roll. Ab. p. 108, tit. Ley Gager (E.), (F.); 11 Vin. Ab. tit. Executors, p. 173.

Part I. not pass by these words (*d*). They are, nevertheless, so far in the nature of personalty, that an action of trover, detinue, or trespass *de bonis asportatis*, will lie for them (*e*).

Chest containing
charters.

There seems formerly to have been some difference of opinion with regard to the box or chest in which charters are preserved, whether this also should pass to the heir; and distinctions have even been taken as to the box being sealed or locked, or otherwise. In Rolle's Abridgment (*f*) it is said, that if charters are in a chest, the executors shall have the chest, and the heir the charters: and if the chest is shut, the heir shall have the chest also; but if it is not shut, the executors shall have the chest. And Swinburne lays it down (*g*), that the box ensealed, though the same be not affixed to the freehold, yet, because it contains those things which belong to the heir, it also belongs to the heir, and not to the executors. But of these distinctions, the author of the Law of Testaments observes, that they seem not to be well taken. For, he says, if it be a box purposed for the keeping of the deeds, the heir ought to have it, whether locked or open: on the other hand, if it be a box designed for other use, as for the keeping of linen, it cannot be said to be appurtenant to evidences, although some be in it, for so may other things also; or perhaps it may

(*d*) Perkins, § 115; Shep. Touch. ch. 5, p. 97; Br. Ab. tit. Chattels, pl. 9; Roll. Ab. tit. Grant (X.); Com. Dig. tit. Biens (D. 2). The law considers them as partaking so much of the nature of land, that larceny at common law cannot be committed of them, 1 Hale, P. C. p. 510; *R. v. Westbeer*, Leach, C. C. 13. But see 1 Hawk. P. C. bk. 1, cap. 19, § 35, and Yr. Bk. 10 Ed. 4, p. 14, where a different reason is suggested for this. — now 24 & 25

Vict. c. 96, ss. 1, 28; and see *R. v. Walker*, 1 Moo. C. C. 155. Charters are not distrainable as chattels. See *post*, p. 388, *in notis*.

(*e*) Com. Dig. tit. Charters (B.); *id.* tit. Action upon the Case, Trover (C.); *id.* tit. Trespass (A. 1). See *Esdaile v. Oxenham*, 3 B. & C. 225; *Winsor v. Pratt*, 2 Brod. & Bing. 650.

(*f*) Roll. Ab. tit. Executors (U.); *id.* tit. Ley Gager (F.).

(*g*) Swinb. Wills, p. 759.

be a chest or cabinet of great value, surely this shall not go to the heir, when perhaps there is not personal estate sufficient to pay the testator's debts (*h*). In like manner in Wentworth's Office of Executors (*i*), it is said, that the distinctions taken in the old cases are not grounded on good reason ; and, in Comyns' Digest, it is laid down, in general terms, that the chest passes to the heir (*j*). Chap. IV. s. 3

But it is to be observed that those deeds and writings only are here intended which concern land, and relate to the freehold and inheritance. For such as relate to personality, as terms of years, goods, &c., will belong to the personal representative, together with the chattel interests to which they refer (*k*). Deeds relating to personality.

So, also, if the writings of an estate are pawned or pledged for money lent, they are considered as chattels in the hands of the creditor, and, in case of his decease, they will go to his personal representative, as the party entitled to the benefit accruing from the loan (*l*). Deeds pledged.

(*h*) Law of Test. p. 343.
Vide Burn's Eccl. Law, 407.

(*i*) At p. 156 (14th ed.).

(*j*) Com. Dig. tit. Biens (B.); *id.* tit. Charters (A.). See upon this subject Yr. Bk. 36 Hen. 6, p. 26; Finch, p. 22; Plowd. p. 323 a; Br. Ab. tit. Chattels, pl. 18; Roll. Ab. tit. Graunts (X.), pl. 5; Godolph. Orph. Leg. pt. 2, ch. 13, § 5; Shep. Touch. p. 470; Noy, Max. pp. 239, 240. It is said, that larceny cannot be committed of the box in which charters are kept. 1 Hale, P. C. p. 510; 3 Inst. 109.

(*k*) Went. Off. Executors, p. 153; 3 Bac. Ab. tit. Executors (H. 3), p. 494.

(*l*) Shep. Touch. p. 469;

Toller's Executors, p. 191 (7th ed.). To whom the possession of deeds appertains in different cases, see, upon a warranty of title, *Lord Buckhurst's case*, 1 Co. 1; Harg. Co. Lit. 20 a (N. 117): in case of conveyances to uses, *Earl of Huntingdon v. Mildmay*, Cro. Jac. 217; Harg. Co. Lit. 6 a (N. 4): in case of estates for life or in tail, Finch, p. 22; *id.* p. 108; *Papillon v. Voice*, 2 P. Wms. 471; *Leathes v. Leathes*, 5 Ch. D. 221: in case of a purchase not completed, *Esdaile v. Oxenham*, 3 B. & C. 225. And for other cases on this subject, see Fitz. N. B. tit. Detinue; *Hicks v. Hicks*, 2 Dick. 650; *Webb v. Webb*, 1 Ed. 8; *Yea v. Field*, 2 T. R.

Part I.

OF HEIR-LOOMS.

Another instance in which property may pass to the heir, although it is in itself of a personal nature, is in the case of heir-looms.

Heir-looms go with the estate by custom ;

But are personal chattels.

Heir-looms, chiefs, or principals, are those things which have continually gone with the capital messuage (*m*), and which upon the death of the owner descend to the heir along with and as a member of the inheritance, according to the special custom of some countries. An heir-loom, in its strict and proper sense, is always some loose personal chattel, such as would ordinarily, and but for the particular custom, go to the personal representative of the deceased proprietor (*n*). Lord Holt, indeed, is reported to have said, that goods in gross cannot be heir-looms, but that they must be things fixed to the freehold, as old benches, tables, &c. (*o*). And it is observable that Spelman thus defines an heir-loom : “ *Omne utensile robustius quod ab ædibus non facile revellitur, ideoque ex more quorundam locorum ad hæredem transit tanquam membrum hæreditatis* ” (*p*).

As the best bed, table, &c.

But the instances met with in the different authorities are always things of a mere personal chattel kind, not affixed to the house or land ; such as the best bed, table, pot, pan, cart, or other dead chattel moveable. These are the only kind of heir-looms mentioned by Lord Coke (*q*) ; and he illustrates his remarks upon them by this citation

708 ; *Roberts v. Wyatt*, 2 Taunt. 268 ; *Hooper v. Ramsbottom*, 6 Taunt. 12 ; *Philips v. Robinson*, 4 Bing. 106. See further, Dart's *Vendors and Purchasers*, p. 407 *et seq.* (8th ed.).

(*m*) 14 Vin. Ab. tit. Heir-loome, p. 290.

(*n*) Co. Lit. 18 b, 185 b.

(*o*) *Lord Petre v. Heneage*, 12 Mod. 520, at *Nisi Prius*. But see the same case in 1 Ld.

Raym. 728, where Lord Holt is reported merely to have said, that only things ponderous can be heir-looms.

(*p*) Spelm. Gloss. *sub voc.* Heier-Lome. As to the derivation of the word “Heir-loom,” see *Byng v. Byng*, 10 H. L. Cas. at p. 183, per Lord Cranworth.

(*q*) Co. Lit. 18 b.

from the old Entries: “ *Consuetudo hundredi de Stretford* Chap. IV. s. 3.
 “ *in Com’ Oxon’ est, quòd hæredes tenementorum infra hun-*
 “ *dredum prædictum existentium post mortem antecessorum*
 “ *suorum habebunt, &c. principalium, Anglice, an heire-loome,*
 “ *viz. de quodam genere catallorum, utensilium, &c. optimum*
 “ *plaustrum, optimam carucam, optimum ciphum, &c.*” So,
 in *Les Termes de la Ley*, an heir-loom is said to be “ any
 “ piece of household stuff (*ascun parcel des utensils d’un*
 “ *mease*) which, by the custom of some countries, having
 “ belonged to a house for certain descents, goes with the
 “ house (after the death of the owner) unto the heir, and
 “ not to the executors.”

Sir William Blackstone, in the Commentaries (*r*), describes heir-looms as goods and chattels and always treats them as personalty; though (with some degree of inconsistency perhaps) he says, they are generally such things as cannot be taken away without damaging or dismembering the freehold. And in one part of the Commentaries (*s*) he says expressly, “ An heir-loom, or implement of furniture, which by custom descends to the heir together
 “ with an house, is neither land nor tenement, but a mere
 “ moveable” (*t*). And indeed, if by heir-looms were to be understood only matters affixed to the freehold, it would follow that there are some articles attached to the realty which require the aid of custom to make them descendible with the inheritance, and which, but for such custom, would legally belong to the executor. Such a principle, however, is altogether inconsistent with the general rule respecting annexations to the freehold; unless, indeed, it be thought that in these cases, the chief operation of custom upon a matter which would of itself necessarily pass to the heir as parcel of the freehold, is by imparting

Not things
affixed to the
freehold.

(<i>r</i>) Vol. ii. p. 428.	(<i>E.</i>); Doct. & Stud. p. 228.
(<i>s</i>) Vol. ii. p. 17.	So, the heir may recover an
(<i>t</i>) And see to the same effect, Roll. Ab. tit. Descent	heir-loom in <i>detinue</i> . Br. Ab. tit. <i>Detinue</i> , pl. 30.

Part I.

to it a further incident (which will presently be noticed) (*u*), viz. that of making it inseparable and inalienable from the inheritance by devise.

Things in the nature of heir-looms.

But besides heir-looms properly so called, there are certain species of chattels which may be considered in the nature of heir-looms, and which are also held to pass to the heir with the inheritance. The things referred to seem, however, to differ from those that are strictly heir-looms, because the title of the heir in these cases does not depend upon any local custom. And an attention to this distinction would remove the confusion which has sometimes arisen, from classing under the general name of heir-looms all those personal chattels which the law gives to the heir as part of or incident to his inheritance. Thus, the coat-armour of an ancestor hung in a church, and the sword, pennons, and other ensigns of honour suited to his degree, descend to the heir in the nature of heir-looms. And in like manner, ancient portraits and family pictures, though not fastened to the walls of the house, accompany the inheritance; and the executor is not allowed to remove them, although they are mere personal chattels (*v*). So also the collar of S. S. and garter of gold, descend as ensigns of honour and state, in the way of heir-looms; and this, even although there may be a special bequest of all jewels (*w*). And so the ancient jewels of the Crown

Coat-armour, ancient pictures, &c.

Collar of S. S. and garter.

Crown jewels.

(*u*) *Post*, p. 257.

(*v*) *Corren's case*, 12 Co. 105; *Day v. Beddingfield*, Noy, 104; *May v. Gilbert*, 2 Bulst. 151; *Francis v. Ley*, Cro. Jac. 366; Vin. Ab. tit. Descent (E.); Com. Dig. tit. Cemetery (C.); Went. Off. Executors, p. 141, note (2).

(*w*) Vin. Ab. tit. Executors, 167; *Earl of Northumberland's case*, Owen, 124; Swinh. Wills. pt. 3, § 6. And

see *Lord Petre v. Heneage*, 12 Mod. 520. For an explanation of the Collar of S. S., see Selden's Titles of Honour. Mr. D'Israeli relates, from an article among the Sloane MSS., that upon Lord Coke's disgrace, the new Chief Justice sent to purchase his collar of S. S. Lord Coke returned for answer, that he would not part with it, but would leave it to his posterity, that they

are accounted heir-looms (*x*) ; because they are necessary to maintain the state and support the dignity of the Sovereign for the time being (*y*). Chap. IV. s. 3.

Again, as was noticed in a former page, the ornaments of a bishop's chapel are considered to be of the nature of heir-looms ; and as such pass to the successor in the see (*z*). And in like manner, things belonging to ecclesiastical houses, and which have continually passed from successor to successor, have sometimes been esteemed as heir-looms. Ornaments of bishop's chapel.
Things in ecclesiastical houses.

Moreover, the heir may sometimes claim a right to a personal chattel from the peculiar manner under which Ancient horn.

might one day know they had a Chief Justice for their ancestor. D'Israeli's *Curiosities of Literature*, 2nd series, vol. i. p. 298.

(*x*) 2 Bl. Com. 428; 14 Vin. Ab. tit. Heirloome, p. 290; Swinb. Wills, pt. 3, § 6, p. 252.

(*y*) King James I., by indenture between himself (under the Great Seal) and the lords and others of his Privy Council (A.D. 1606), "annexed "and assured individually "and inseparably for ever, "to the crown of this realme, "divers and many royall "and princely ornaments and "jewels of great value and "estimation," consisting of diadems, coronets, circlets, collars, borders, &c. See the deed, entitled "*De Jemmis et Jocalibus Coronæ Angliæ annexandis*," in Rym. Fœd. vol. 16, p. 641. There is also a schedule annexed giving a full and particular description of each ; and it enumerates, among others, "*The Imperial*

"*Crowne of this Realme of Goulde* ; and a great and "riche jewell of gould, called " "*The Mirrour of Great Brit- "taine.*" " King Charles I., in the beginning of his reign, ordered several valuable jewels, many of which had passed with the Crown in continual succession, to be sold, under a special warrant to the Duke of Buckingham. Among them was the above-mentioned, "*great and rich jewel of gould, called the "Mirrour of Great Brittain,*" and a very valuable collar, known as *the inestimable great collar of ballast rubies*. See the warrant in the 18th vol. of Rym. Fœd. p. 236. Afterwards, at a subsequent period of his reign, many other of the Crown jewels were pawned or disposed of abroad : whereupon, in 1642, an order was issued by the Parliament, specially forbidding any such disposition of them.

(*z*) *Ante*, p. 196.

Part I.

the estate is holden. Thus an ancient horn, where the tenure of the land is by cornage, shall always descend to the heir (*a*). But things of this description seem rather to resemble charters of inheritance; or they might, perhaps, more properly be ranked among some of the species of possessions which are treated of in the ensuing pages.

Chattels
limited as
heir-looms.

But further, a testator may by his will constitute what has been called a *quasi* heir-loom. That is to say, he may devise, or limit in strict settlement, an estate and capital mansion, together with personal property, as the plate, pictures, library, and furniture therein, such plate, &c., to be enjoyed, together with the house and estate, inalienable by the devisees in succession, so far as the law will allow (*b*). Limitations of this sort depend upon the principles of executory devises, and the doctrines of equity; for a remainder, in the strict sense of the term, can only be limited of a freehold estate. This subject has given rise to many questions of considerable nicety; and it will be sufficient, on the present occasion, to observe generally, that upon such a devise or settlement, the absolute interest in the chattels, subject to the interest for life which may be created in them, will vest in the person who is entitled to the first estate of inheritance, whether in tail or in fee; and upon his death the property will devolve upon his personal representative (*c*).

(*a*) *Pusey v. Pusey*, 1 Vern. 273. As to tenure by cornage, *vide* Co. Lit. 107 a. Of the Pusey and other horns, as a charter or instrument of conveyance, see several curious particulars in the Archæologia, vol. 3, p. 1 *et seq.* And see *id.* vol. 1, p. 168, vol. 5, p. 340, vol. 6, p. 42.

(*b*) Wooddeson, Vin. Lect. vol. 2, p. 380. See *Cadogan v. Kennett*, Cowp. 432; *Foley*

v. Burnell, Cowp. 435, *in notis*; *Bill v. Kinaston*, 2 Atk. 81; *Richards v. Baker*, *id.* 320; *Slanning v. Style*, 3 P. Wms. 334. And see Fearne, Cont. Rem. 407 (10th ed.); Harg. Co. Lit. 18 b (N. 109).

(*c*) The several decisions upon this subject are collected in Roberts' Treatise on Wills, vol. 2, p. 295 *et seq.*; Jarman on Wills, vol. 2, p. 577 *et seq.* (4th ed.); Williams' Execu-

With respect to heir-looms properly so called, viz., those depending on custom, it appears that they cannot be devised away from the heir; that is to say, when the inheritance to which they belong descends to him. For Lord Coke lays it down, that “if a man be seised of a house, “and possessed of divers heir-loomes that by custome have “gone with the house from heire to heire, and by his will “deviseth away the heir-loomes, this devise is void” (*d*). Upon this it has been observed by Professor Woodeson in his Vinerian Lectures (*e*), that the opinion of Lord Coke is founded upon a decision in 1 Hen. 5. 108, which, he thinks, being prior to the Statute of Wills, could only amount to a determination against such a devise of heir-looms separately from the house by way of personalty; and he supposes that at present they might be devised as realty distinct from the estate. Upon reference, however, to the passage in Co. Lit. it appears, that Lord Coke grounds his opinion upon a principle which applies as well to a devise of realty as of personalty: viz. that the *custom* vests the property in the heir instantly upon the death of the testator, and takes place of the devise, which has effect only after the death of the testator. And although this reasoning has not been universally assented to, yet the doctrine appears to have been recognized by many subsequent authorities (*f*).

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Heir-looms
not devisable
apart from
the estate.

The owner of the inheritance, however, may, during his life, sell or dispose of these customary heir-looms, as he

May be
granted away
by the owner;
or devised
with the
freehold.

tors, p. 731 (8th ed.). The Chancery Division had formerly no jurisdiction to order a sale of such *quasi* heirlooms. *D'Eyncourt v. Gregory*, 3 Ch. D. 635. But see now 45 & 46 Vict. c. 38, s. 37.

(*d*) Co. Lit. 185 b. So, *per* Lord Coke, the crown jewels are not devisable by testa-

ment, Co. Lit. 18 b.

(*e*) Vol. 2, p. 380.

(*f*) Com. Dig. tit. Biens (B.); Harg. Co. Lit. 18 b (note), and 185 b; *Tipping v. Tipping*, 1 P. Wms. at p. 730, *per* Lord Macclesfield, C. And see Mr. Serjt. Hill's MS. note, 14 Vin. Ab. 290, in Linc. Inn. Lib.

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may of the timber of his estate (*g*). And if he devise the house away from the heir, it is presumed that in this case the heir-looms would pass with the house to the devisee (*h*).

OF DEER, FISH, ETC. AS INCIDENT TO THE INHERITANCE.

Fish belong
to the heir.

There is another description of property, which the law considers to be so appropriated to, and so necessary to the well-being and enjoyment of the inheritance, that although it is in itself of a personal nature, yet it always accompanies the land and vests in the heir, and does not pass to the personal representative. For, as it is said by the old writers, if a man buy divers fishes, as carps, breames, tenches, &c., and put them in his pond, and dieth, in this case the heir who has the water shall have them, and not the executors; but they shall go with the inheritance, because they were at liberty, and could not be gotten without industry, as by nets, and other engines (*i*): otherwise, however, it is, if they are in a trunk, or in a net, or the like; for then they are severed from the soil (*j*).

So deer,
conies, swans,
&c.

So likewise, of deer in a park, conies in a warren, and doves in a dove-house (*k*); and, according to some autho-

(*g*) 2 Bl. Com. 429.

(*h*) That, if an estate be devised in tail with remainders, the devise over is good as to the heir-looms as well as to the estate, see Mr. Serjt. Hill's MS. note, 14 Vin. Ab. 291.

(*i*) Co. Lit. 8 a; *Liford's case*, 11 Co. at p. 50 b; Swinb. Wills, 759; Keilw. 118; 4 Leon. 240; *Greye's case*, Owen, 20; *Parlet v. Cray*, Cro. Eliz. 372; 1 Roll. Ab. tit. Executors, p. 916; Com. Dig. tit. Biens (B.); Wentworth's Off. Executors, p. 127.

(*j*) *Id. ib.*; 3 Bac. Ab. tit. Executors, p. 494; Com. Dig. tit. Biens (F.).

(*k*) Note (*i*) *sup.*; *Case of Swans*, 7 Co. at p. 17 b. See also Yr. Bk. 18 Ed. 4, p. 14; Godolph. Orph. Leg. p. 126; Noy, Max. pp. 230, 240; 11 Vin. Ab. tit. Executors, p. 166. And see *R. v. Townley*, L. R., 1 C. C. R. 315. It would appear that the above rule respecting deer must be understood only of deer in *legal* parks, *i. e.* parks by grant or prescription. See *per* Willes, C. J., in *Davies v. Powell*, Willes' Rep. 46. And even in such parks deer may be so tame and reclaimed from their natural state as to pass to the executors as personal property,

rities, pheasants and partridges in a mew; swans, though unmarked, in a private moat or pond, or kept on water within a manor, or at large, if marked; and bees in a hive; all which, as is said by these authorities, shall go along with the inheritance: and the reason assigned is, because without them, the inheritance is incomplete (*l*). And these things are considered in law so much a part of the inheritance, that the destruction of them is waste. And therefore if a tenant for life of a park, vivary, warren, or dove-house, kills so many of the deer, fish, game, or doves, that there is not sufficient left for the stores, it is waste (*m*).

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It is said in Swinburne's Treatise on Wills (*n*), that hawks and hounds belong to the heir with the estate: and

Hawks and hounds belong to the heir.

Morgan v. Earl of Abergavenny, 8 C. B. 768; *Ford v. Tynte*, 2 J. & H. 150. Probably it may upon investigation of the subject appear, that the principle upon which deer in a legal park are said to belong to the heir and not to the executor, may be this: that whilst brought within no other enclosure than the wide range of a legal park, deer may be supposed to retain their wild nature; they may not, therefore, in that condition, be distinct subjects of property so as to pass to the executor; and the only person capable of exercising any right over them, or rather of capturing them, may be the owner, for the time being, of the park; not perhaps as heir of the former owner, but simply *ratione soli*.

(*l*) See the preceding notes, and Shep. Touch. 469. *Qu.* as to pheasants, &c., in a mew? A mew is properly a place for

keeping or mewing up falcons. Whence "*muta regia*," the king's mews or falconry. Cowell's Dict. Larceny may be committed of pheasants in a mew, 1 Hale, P. C. p. 511, 1 Hawk. P. C. Bk. I. c. 19, § 39, p. 149, or while being reared under a common hen, *R. v. Corry*, 10 Cox, C. C. 23. The same of partridges, *R. v. Shickle*, L. R., 1 C. C. R. 158. And swans also may be the subject of larceny, Dalton, cap. 156. And according to the authorities cited *post*, p. 260, pheasants, &c., so confined would not belong to the heir. See generally, on the subject of animals *feræ naturæ*, the interesting judgment delivered by Bayley, J., in *Hannam v. Mockett*, 2 B. & C. 934, where it was held that rooks are not a subject of property.

(*m*) 1 Cru. Dig. tit. 3, chap. 2, § 20; Vin. Ab. tit. Waste (E.); Co. Lit. 53 a.

(*n*) Part 7, § 10, p. 938.

Part I.

Noy is an authority to the same effect (*o*); and he says, that by a grant of all goods and chattels, neither hawks nor hounds nor other things *feræ naturæ* shall pass, and the heir shall have them. It is presumed, however, that at the present time the law is otherwise with respect to this description of property (*p*).

Otherwise
where the
testator has
a chattel in-
terest;

It should be observed that in these cases the testator is supposed to have the inheritance in the park, pond, &c.; consequently the question is between the heir succeeding to the ancestor's estate, and the executor who takes no interest whatever in the land. But the case will be different if the testator has only a term of years in the premises; for then if he dies before his term is expired, as his executor succeeds to his interest in the land, he will also have the deer, &c., with the land to which they belong. For in this case they pass to the personal representative as accessory chattels following the state of the principal; and the heir can have no right to the interest in the land which is itself personalty (*q*). In like manner, if the testator have any tame deer, rabbits, pheasants, partridges, pigeons, &c., they shall go to the executors: and though they were not

Or the deer,
&c., are tame.

(*o*) Noy, Max. p. 240; *id.* pp. 144, 230.

(*p*) See Went. Off. Executors, 143; Godolph. Orph. Leg. pt. 2, ch. 13, and pt. 3, ch. 21; 3 Bac. Ab. tit. Executors (H.), p. 485. It is said to be to this day a branch of the king's prerogative upon the death of every bishop, to have his mew or kennel of hounds (*muta canum, meute de chiens*), or a composition in lieu thereof, 4 Inst. 338; Swinb. Wills, pt. 2, § 26; 2 Bl. Com. 413; Cowell's Dict. Upon this subject see Spelm. Rem. p. 117, in the Answer to the Apology of Archbishop Abbot for shoot-

ing the keeper of Bramsil Park while hunting.

(*q*) Went. Off. Executors, 127; Godolph. Orph. Leg. pt. 2, ch. 13. And see Harg. Co. Lit. 8 a (note), where, however, the distinction above adverted to is expressed in terms that might perhaps be misunderstood. See also 11 Vin. Ab. tit. Executors (Z), p. 166. So, if an executor takes an estate *pur autre vie*, or an heir succeeds as special occupant, they will have the same interest in the property that the deceased owner of the particular estate enjoyed.

tame, yet if they were kept alive in any cage, room, or Chap. IV. s. 3. such like place, the executors shall have them (*r*).

The species of property spoken of in this division is sometimes considered by writers to pass with the inheritance as heir-looms. But it has been shown in a preceding page that the right of the heir in respect of heir-looms is founded, not upon the nature of the chattels themselves, but altogether upon special custom.

OF THINGS ANNEXED TO THE FREEHOLD OF THE CHURCH.

It has been seen in a former page that the coat-armour and ensigns of honour of an ancestor, such as pennons, armorial trophies, achievements, &c., hung up in a church, belong to the heir in the manner of heir-looms. The same rule holds as to monuments, tomb-stones, and effigies, &c., set up in the church. And notwithstanding these things may be absolutely affixed to the walls or fabric of the church, yet the parson shall not take them although the freehold of the church is in him. For Lord Coke says (*s*), “If a nobleman, knight, esquire, &c., be buried in a church, and have his coat-armor and pennons with his armes, and such other ensignes of honour as belong to his degree or order, set up in the church, or if a grave-stone or tombe be laid or made, &c., for a monument of him, in this case albeit the freehold of the church be in the parson, and that these be annexed to

Monuments,
effigies, &c.

(*r*) Went. Off. Executors, p. 143; Law of Test., p. 341. In this latter authority it is said that pigeons, though not tame, yet if they are not able to fly, shall belong to the executors; with which *acc.* 3 Bac. Ab. tit. Executors (H.), 494. But see a contrary rule in several of the authorities above referred to. It is larceny to steal tame pigeons which are kept in a dovecote, but have

free access to the open air; *R. v. Cheafor*, 2 Den. C. C. 361. And see *R. v. Brooks*, 4 C. & P. 131. As to the distinctions taken in early times with respect to the property in deer that were tame, or which could be identified by some peculiarity, as white deer, see Reeves's Hist. vol. 3, p. 370 (ed. by Finlason, vol. 2, p. 597).

(*s*) Co. Lit. 18 b.

Part I.

“ the freehold, yet cannot the parson or any take them or
 “ deface them, but he is subject to an action to the heire
 “ and his heires in the honour and memory of whose
 “ ancestor they were set up (*t*). And so it was holden
 “ Mich. 10 Ja. and herewith agree the lawes in other
 “ countries. Note this kind of inheritance. And some
 “ hold that the wife or executors that first set them up
 “ may have an action in that case against those that
 “ deface them in their time ” (*u*).

Tombstone.

It was held, however, in a case in the Court of Common Pleas (*v*), that the property of a tomb-stone remained in the party who erected it, and that he might maintain an action of trespass against a person who wrongfully removed it from the churchyard and afterwards erased the inscription (*w*). The property of a coffin and shroud remains, it is said, in the executors or other person who

Coffin and shroud.

(*t*) Unless they were set up without the consent of the ordinary. See Gibson's Codex, 454; *Palmer v. Bishop of Exon*, 1 Str. 576. And see *Ritchings v. Cordingley*, L. R., 3 A. & E. at pp. 116, 122.

(*u*) *Corven's case*, 12 Co. 105; 3 Inst. 110, 202; Roll. Ab. tit. Discent (E.); *R. v. Crosse*, 1 Sid. at p. 206; *Frances v. Ley*, Cro. Jac. 367; *Dawtrie v. Dee*, 2 Roll. Rep. 140; Doct. & Stud. pp. 305, 309; Degge, 217; Com. Dig. tit. Cemetery (C.). See also *Hitchcock v. Walford*, 5 Scott, 792. As to the right to erect monuments in a church, see 3 Inst. 202; Degge, *supra*. And see *Beckwith v. Harding*, 1 B. & Ald. 508; *Bardin v. Calcott*, 1 Consist. 14; *Maidman v. Malpas*, *id.* 205; *Palmer v. Bishop of Exon*, 1 Str. 576; *Cart v. Marsh*, 2 Str. 1080; *Rosher v.*

Vicar of Northfleet, 3 Addams, 15; *Hopper v. Davis*, 1 Lee, 640; *Brecks v. Woolfry*, 1 Curteis, 880. And see *Rich v. Bushnell*, 4 Hagg. 164.

(*v*) *Spooner v. Brewster*, 3 Bing. 136; S.C. 2 C. & P. 34. And see Com. Dig. tit. Cemetery (C.); *Wright v. Wright*, 9 R. 15.

(*w*) As to the right of the incumbent to grant the privilege of making a vault, and erecting a tablet, &c. in the church, and the interest thereby conferred, see the authorities referred to in the preceding notes, and the case of *Bryan v. Whistler*, 8 B. & C. 288. See also Rogers's Eccl. Law, 187. As to the rights of the heir where there is a grant of a grave space by a Burial Board to A. and his heirs, see *Matthews v. Jeffrey*, 6 Q. B. D. 290.

was at the charge of the funeral; and it may be laid as Chap. IV. s. 3. theirs in an indictment for stealing them (*x*).

But things that are fixed up in a church not in honour of individuals, but for other purposes, as when a church is hung in mourning, or when ornaments or erections, as scaffoldings, &c., are put up on public occasions, become the property of the parson, in consequence of his possession of the freehold, and on the ground of their being a tacit gift to him (*y*).

Mourning
hung in a
church,
scaffolding,
&c.

With respect to pews and seats erected in a church, these become by annexation parcel of the freehold of the incumbent; though the use of them is in those who have the use of the church (*z*). And therefore, if seats have been annexed to the church without legal authority, it is said that the property of the materials when pulled down is in the parson, who may sue the wrongdoer in trespass. But as to seats put up by the parishioners by good authority, it seems, according to the ecclesiastical writers, that the property of the materials upon removal will be in the parishioners, and that the churchwardens, and not the

Pews and
seats.

(*x*) Russell on Crimes, vol. 2, p. 256 (5th ed.). *Seemle*, the same of a vase in which the ashes of a cremated body are buried; see the facts in the case of *Williams v. Williams*, 20 Ch. D. 659.

(*y*) See Cases with Opinions, vol. 1, p. 277. Upon this point, however, see *Cramp v. Bayley*, Kent Lent. Ass. 1819, cited in the notes to the 7th edition of Degge's Parson's Counsellor, p. 218. And see Prideaux's Directions, p. 100, and the authorities there referred to. It is certainly true that the soil and freehold of the church and churchyard are

in the parson; but the freehold is in him, not for his own emolument, but for public purposes only, as for supplying places for sepulture, &c. With respect to trees in the churchyard, see *post*, p. 265.

(*z*) Yr. Bk. 8 Hen. 7, p. 12; Br. Ab. tit. Chattels, pl. 11; *Stocks v. Booth*, 1 T. R. at p. 430, per Ashhurst, J.; *Mainwaring v. Giles*, 5 B. & Ald. 356, 361. As to the evidence necessary to establish a prescriptive right to a pew, see *Pettmann v. Bridger*, 1 Phill. Rep. 316; *Crisp v. Martin*, 2 P. D. 15.

Part I.

parson, may maintain an action for taking them away (a). With respect, however, to moveable seats in a church, it seems that the party who set them up may remove them at his pleasure (b).

Bells.

If a man hang up bells in the steeple, they become church goods, although they may not be expressly given to the church: he cannot therefore afterwards remove them; and if he does, he may be sued by the churchwardens, to whom the custody and possession of the goods of the church belong, though the property of them is in the parishioners (c). In the same manner the churchwardens are entitled to the possession of, and have therefore a special property in, the bell-ropes (d).

Bell-ropes.**Organ.**

So, if a man take the organ out of a church, the churchwardens may have an action of trespass against him; because the organ belongs to the parishioners and not to the parson, and the parson cannot sue the taker in the Ecclesiastical Court (e). And the succeeding church-

(a) Degge, p. 213; Burn's Eccl. Law, vol. 1, tit. Church, pp. 364, 376; *Gibson v. Wright*, Noy, 108. See Shaw's Parish Law, p. 37 (6th ed.); Prideaux's Directions, pp. 115, 116.

(b) Degge, p. 211. See further Watson's Comp. Incumb. c. 39; Burn's Just. vol. 1, tit. Church, p. 693 *et seq.*; Prideaux's Directions, p. 117, *in notis*.

(c) Yr. Bk. 11 Hen. 4, p. 12; Degge, p. 217; Burn's Eccl. Law, vol. 1, tit. Church, p. 377; Com. Dig. tit. Eglise (F. 3); *Hadman v. Ringwood*, Cro. Eliz. 145; *Starky v. Churchwardens of Watlington*, 2 Salk. 547; *Welcome v. Lake*, 1 Sid.

281, S. C. 2 Keb. 22. That bells are parcel of the freehold of the church, see Yr. Bk. 11 Hen. 4, p. 12; *R. v. Crosse*, 1 Sid. at p. 206; S. C. 1 Lev. 136. As to the origin of bells and chimes, and some curious observations upon them, see *Watkins v. Seaman*, Lutw. Rep. by Nelson, at p. 327; *Woodward v. Makepeace*, 1 Salk. 164; Roll. Ab. tit. Prohibition (K.); *R. v. Crosse*, *supra*. See also Hook's Church Dictionary, tit. Bells.

(d) *Jackson v. Adams*, 2 Bing. N. C. 402.

(e) Roll. Ab. tit. Churchwardens (A.) It is not competent to the organist to play on the organ in defiance of

wardens may sue, although the trespass was done in the time of their predecessors (*f*). Chap. IV. s. 3.

The incumbent has in the first instance the right to the possession of the keys of the church, and the churchwardens have only the custody of the church under him (*g*).

The trees growing in a churchyard belong to the incumbent, and he may bring his action, if they be cut down (*h*). Trees in churchyard.

OF EMBLEMENTS.

It will be useful to advert, in the last place, to another species of property which has often been compared to fixtures, and respecting which, questions frequently arise between the heir and the personal representative of the deceased owner of the inheritance. There are certain vegetable products of the earth, which, although they are annexed to and growing upon the land at the time of the proprietor's death, yet, as between his heir and his executor, are considered as a chattel interest, and will pass to the executor. Emblements between heir and executor.

the directions of the incumbent, *Wyndham v. Cole*, 1 P. D. 130.

(*f*) *Hadman v. Ringwood*, Cro. Eliz. 145, 179.

(*g*) *Lee v. Matthews*, 3 Hagg. Ecc. Rep. at p. 173; *Dewdney v. Ford*, 7 Jur., N. S. 637; *Ritchings v. Cordingley*, L. R., 3 A. & E. 113, 123.

(*h*) Br. Ab. tit. Trespass, pl. 210; Lyndw. 267; *Strachy v. Francis*, 2 Atk. 217. The preamble of the ancient stat. 35 Edw. I. st. 2, entitled "*Statutum ne Rector prosternat Arbores in Cæmitario*," recites, that "Forasmuch as a churchyard that is dedicated, is the

soil of the church, and whatsoever is planted belongeth to the soil, it must needs follow, that those trees which be growing in the churchyard are to be reckoned amongst the goods of the church, the which laymen have no authority to dispose; but as the Holy Scripture doth testify, the charge of them is committed only to priests to be disposed of," &c. The statute then directs that the timber shall be applied to the repair of the chancel, &c. Of this statute, Lord Coke observes, that it is but a declaration of the common law, *Liford's case*, 11 Co. at p. 49 a.

Part I.

Trees, fruits,
&c., belong to
the heir.

In general, trees and the fruit and produce of them, from their intimate connection with the soil, follow the nature of their principal; and, therefore, when the owner of the land dies, they descend to the heir, unless they have been previously severed (*i*). So it is of hedges, bushes, &c. For all these are the natural or permanent profit of the earth, and are reputed parcel of the ground whereon they grow (*j*).

Year's crop of
corn, &c.,
goes to the
executor;

But corn and other products of the earth which are produced annually by labour and industry (and thence called *fructus industriales*), having been sown with the intention of being afterwards separated from the realty, are held to partake of a personal nature. Hence, if the proprietor sows or plants his land, and dies before gathering the produce, his personal representative is entitled to take the profits of the crop, or the *emblements*, as a compensation for the labour and expense of tilling, manuring, and sowing the land. And this rule of law is founded on a consideration of public benefit, and is said to be for the encouragement of husbandry, and the increase and plenty of provisions (*k*).

(*i*) Com. Dig. tit. Biens (H.); *Liford's case*, 11 Co. 48. Trees removable by a nurseryman belong to his executors; as to which see *ante*, p. 100.

(*j*) It would seem that not only the natural fruits, that is, such as grow of their own accord and without any great labour or cost, but all growing fruits, though produced by skill and culture, are the property of the heir. See Swinb. Wills, pp. 934, 935; Noy, Max. 116; Godolph. Orph. Leg. pt. 2, ch. 14, § 1, and pt. 3, c. 21, § 13; *Latham v. Atwood*, Cro. Car. 515; 3 Bac.

Ab. tit. Executors (H. 3); Com. Dig. tit. Biens (B.); Went. Off. Executors, p. 145; Freem. Cas. Chy. 210; *Rodwell v. Phillips*, 9 M. & W. 501.

(*k*) Co. Lit. 55 b; Roll. Ab. tit. Emblements, pl. 9 *et seq.*; Swinb. Wills. pp. 210, 253; Com. Dig. tit. Biens (G. 1); 2 Bl. Com. 122; *Graves v. Weld*, 5 B. & Ad. 105. And see *Flanagan v. Seaver*, 9 Ir. Ch. R. at p. 233. "Emblements" is derived from the French "*emblavence de bled*;" i. e. corn sprung or put up above ground. Cowell's Dict.

It is now fully established, that not only corn and grain of all kinds are emblements, but every thing of an artificial and annual profit that is produced by labour and manurance. Thus, hemp, flax, saffron, and the like (*l*); and melons, cucumbers, artichokes, &c. And hops also, although they spring from old roots, because they are annually manured and require cultivation, and an additional expense is incurred annually which is necessary to make them grow (*m*). And so of turnips, carrots, potatoes, &c. (*n*).

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So hemp,
hops, roots,
&c.

Of the latter kind of produce, it is said indeed in an early edition of Wentworth's Office of Executors (*o*), that roots in the ground and artichokes also, shall not go to the executor but to the heir; because they cannot be taken without digging and breaking the soil which belongs to the heir. This opinion, however, is contrary to the general principle of emblements, and to the rule as laid down by Lord Coke: and it appears now to be generally understood, that the executors shall have emblements of all annual crops sown by the testator, which are growing at the time of his decease (*p*).

Artichokes.

In one case, that of *Kingsbury v. Collins* (*q*), it seems to have been held by the Court of Common Pleas that a crop of teasles was the subject of emblements. But the case

Teazles.

(*l*) *Id. ib.*; Godolph. Orph. Leg. pt. 2, c. 13, § 5; Freem. Cas. Chy. 210; Gilbert, Evid. 208, 216; Harg. Co. Lit. 55 b; *Scorell v. Boxall*, 1 Y. & J. at p. 398.

(*m*) *Id. ib.*; Harg. Co. Lit. 55 b (note 364). And see the explanation given as to these in *Graves v. Weld*, 5 B. & Ad. at p. 119. As to hop poles, see *ante*, Chap. I. p. 8.

(*n*) *Ib. id.*; Law of Test, p. 342; *Latham v. Atwood*, Cro.Car. 515; *Frans v. Roberts*, 5 B. & C. at pp. 832, 840;

Haines v. Welch, L. R., 4 C. P. 91; *Kenna v. Nugent*, 6 Ir. R. C. L. 546.

(*o*) Pages 61, 62 (ed. A.D. 1703). And see Gilbert, Evid. 216; Godolph. Orph. Leg. pt. 2, c. 14, § 1.

(*p*) *Vide* Roll. Ab. tit. Emblements, pl. 22; Godolph. Orph. Leg. pt. 2, c. 14; Com. Dig. tit. Biens (G. I.); 3 Bac. Ab. tit. Executors (H. 3); 2 Bl. Com. 123; Harg. Co. Lit. *ubi sup.*

(*q*) 4 Bing. 202.

Part I.

can hardly be considered an authority to that effect. For, it was observed by the Court of King's Bench on a subsequent occasion (*r*), when this case was relied on as an authority that things which take more than a year to arrive at maturity are capable of being emblements, that this point had not been argued, and that the Court did not appear to have been made acquainted with the nature of the crop or its mode of cultivation; or it might be that in the year when this plant is fit to gather, so much labour and expense is incurred as to put it on the same footing as that of hops.

Artificial
grasses.

But the growing crop of grass, even if sown from seed, or though ready to cut for hay, cannot be taken as emblements; because, as it is said, the improvement is not distinguishable from what is the natural product, although it may be increased by cultivation. It seems, however, from some authorities, that the artificial grasses, as clover, sainfoin, and the like, by reason of the greater care and labour necessary for their production, are within the rule of emblements, and belong to the executor(s). But with respect to these latter crops and others of a like nature, the claim of emblements, even if admitted at all, must be understood in a much more limited sense. For in a decision already alluded to (*t*), in which the doctrine of emblements was very elaborately discussed, it was held that the privilege is confined to such species of crops as yield a present annual profit, and to that year's crop which is growing when the interest of the party determines. And therefore, that the right to take a crop of clover did not extend to the full period of its profitable maturity, viz.,

Clover.

(*r*) *Graves v. Weld*, 5 B. & Ad. at p. 120.

(*s*) Roll. Ab. tit. Emblements, pl. 25; *Grantham v. Hawley*, Hob. 132; Freem. Cas. Chy. 210; 3 Salk. 160; Com. Dig. tit. 10, s. 1; Bac. Ab. ubi sit id. 215;

4 Burn's Ecc. Law, p. 409.

(*t*) *Graves v. Weld*, 5 B. & Ad. 105. See Mr. Serjt. Hill's MS. note in 9 Vin. Ab. tit. Emblements, 368; Shep. Touch. by Preston, p. 469. And see *Flanagan v. Seaver*, 9 Ir. Ch. R. at p. 233.

the second year from its sowing, but that if the doctrine of emblements applied to such a crop at all, it could be taken only during the year in which it is sown; although the value at that time did not compensate for the cost and labour of its cultivation.

Chap. IV. s. 3.

With respect to the parties who are entitled to emblements, it is to be observed that the privilege is not confined to the case of the personal representatives of a tenant in fee as against the heir; for the law allows a similar indulgence to many individuals claiming different degrees of interest in land. It would be foreign to the object of the present treatise to enter into a particular enumeration of the several persons entitled to this privilege (*u*); but it may be useful to notice a few instances, for the purpose merely of explaining the manner in which the right is affected by the nature of the estate, and by the mode in which it is determined.

Other persons
who may have
emblements.

Thus, if a tenant for life, whether for his own or *pur auter vie*, sows the land and dies before the severance of the crop, his executors shall have the emblements; because, in this case, the estate of the tenant is said to be determined by the act of God (*v*). But it is otherwise if the tenant *pur auter vie* sows the crop after the death of the *cestui que vie*, but before ejectment brought (*w*). So, where a life estate is determined by the act of law; as if a lease were made to husband and wife during the coverture, and the husband sows the land, and they are divorced *causâ præcontractûs*, the husband in this case shall have the emblements, for the sentence of divorce is the act of law (*x*).

Tenant for
life.

(*u*) The reader is referred to Mr. Justice Williams' valuable Treatise on the Law of Executors, vol. i. pp. 713 *et seq.* (8th ed.).

(*v*) Co. Lit. *ubi sup.*; Roll. Ab. *ubi sup.*

(*w*) *Kelly v. Webber*, 11 Ir. C. L. R. 57.

(*x*) *Oland v. Burdwick*, 5 Co. 116; Roll. Ab. *ubi sup.*

Part I.

Tenants at
will, or from
year to year.

A tenant at will, when the landlord determines the tenancy, is entitled to emblements. So also was a lessee for years, or a tenant from year to year (*y*), of a tenant for life, in cases where the tenancy was determined by the death, or cesser of the estate of the latter (*z*); but such ample powers of leasing have been conferred upon tenants for life by the Settled Land Act, 1882 (*a*), that few, if any, cases of this description are likely to arise in future. And so a tenant of any other estate which is determinable on an uncertain event is entitled to emblements (*b*). Indeed "the general rule is, that whenever a man has an "uncertain interest and sows the land, and his estate "determines, yet he has a title to the corn that he has "sown on the land, though the property of the land is "altered" (*c*). In a case already noticed (*d*), it was said by Best, C. J., in delivering the judgment of the Court, that a tenant from year to year does not know in what year his lessor may determine the tenancy by half a year's notice to quit (*e*), and that in that respect at least he has an uncertain estate. According to this case it seems, therefore, that a yearly tenant may claim emblements, where his tenancy has been determined by the landlord at

(*y*) *Haines v. Welch*, L. R., 4 C. P. 91.

(*z*) But see 14 & 15 Vict. c. 25, s. 1, and cases cited *post*, p. 273 *in notis*; *Haines v. Welch*, *supra*.

(*a*) 45 & 46 Vict. c. 38, s. 6 *et seq.* Upon these provisions, see the annotated edition of the Act by Mr. St. John Clerke, p. 43; and that by Messrs. Wolstenholme & Turner, p. 18. By sect. 51 of the Act prohibitions and restrictions upon the exercise by the tenant for life of the powers conferred upon him are to be deemed void.

(*b*) See the authorities cited in the preceding notes. See

also Perkins, § 513 *et seq.*; Shep. Touch. pp. 244, 471; Swinb. Wills, pt. 3, § 6, p. 253; 2 Bl. Com. pp. 122, 146.

(*c*) Gilb. Evid. 208. As to frivolous claims to emblements, see *Haines v. Welch*, *supra*; *Kenna v. Nugent*, 6 Ir. R. C. L. at p. 552.

(*d*) *Kingsbury v. Collins*, 4 Bing. at p. 207. See *ante*, p. 267.

(*e*) But by the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 33, a year's notice is required in the case of holdings to which the Act applies.

such a time that the tenant cannot reap the crop during the tenancy. Chap. IV. s. 3.

But if the tenant's estate is determined by his *own act*, as for forfeiture by waste, &c., there shall be no emblements (*f*). And upon this principle it was decided that a parson resigning his living was not entitled to emblements of the glebe land (*g*). And as the privilege is founded on public policy, and the justice of affording a recompence to the party, who by his own industry and at his own expense has cultivated the land, the benefit of emblements cannot be claimed by a person although he has an estate which is uncertain, if he is not the actual party who has sown the land, and the charge has been incurred during the existence of a previous estate. Thus, if A seized of land sows it, and then conveys it to B for life, remainder to C for life; and B dies before the corn is reaped; in this case B's executors shall not have it, but it shall go with the land to C; for here the reason of industry and charge fails (*h*). So, where a party has not the exclusive property in the land, as in the case of a joint-tenant who dies; the corn sown goes to the survivor, and the moiety shall not go to the executors of the deceased tenant (*i*).

No emblements where determination by tenant's act,

Or person has not himself sown,

Or where no exclusive property.

(*f*) There are many instances where a party is deprived of emblements owing to a voluntary determination of the estate; as a *femme* copyholder *durante viduitate* on her marriage; tenant at will on outlawry; forfeiture of estate by condition broken, &c. *Vide Oland v. Burdwick*, 5 Co. 116; Roll. Ab. tit. Emblements, pl. 3; *Davis v. Eyton*, 7 Bing. 154. And see *Kelly v. Webber*, 11 Ir. C. L. R. at p. 61.

(*g*) *Bulwer v. Bulwer*, 2 B. & Ald. 470. The advantages

of emblements are extended to the parochial clergy by st. 28 Hen. 8, c. 11, s. 4 (Revised Ed. Statutes). And see *O'Connor v. Tyndall*, 2 Jones (Ex. R.), 20. See also Swinb. Wills, pt. 2, § 26; 2 Bl. Com. *ubi sup.*; 1 Cru. Dig. tit. 3, ch. 1, § 56.

(*h*) *Grantham v. Hawley*, Hob. 132; *Spencer's case*, Winch, 51; *Anon.*, Cro. Eliz. 61; *Knevett v. Poole*, *id.* 463; Roll. Ab. tit. Emblements, pl. 21.

(*i*) *Anon.*, Cro. Eliz. 61; Co. Lit. 55 b.

Part I.

Devise of
emblems.

But although, in general, the right to take the emblems belongs to the personal representative, as against the heir of the deceased owner of the inheritance, yet if there is an express devise of the land itself, the growing crops pass to the devisee, and the executor shall not take them. For it is presumed then in favour of the devisee, that it was the testator's intention to pass not only the land itself, but that which appertained thereto (*j*). On the other hand, this presumption is rebutted if the growing corn is expressly devised away, or there is any personal bequest in the will which can apply to emblems, as goods, stock, &c. For in this case the legatee will be entitled to the crops, and will take them against the heir, the executor, and the devisee of the land (*k*).

Interest in
the land
until sever-
ance.

Where there is a right to emblems, the law confers a free entry, egress and regress, in order to cut and carry them away (*l*). With respect, however, to the nature of the interest which the tenant or the personal representative has in the land until the corn is ripe, there is but little information to be found in the authorities; neither does it satisfactorily appear whether any compensation is to be made for the occupation of the land in the meantime (*m*).

The rights in respect of emblems of tenants at rack rents, where the tenancy is determined by the cesser of the

(*j*) *Spencer's case, supra*; Perkins, § 519; *Anon.*, Cro. Eliz. *supra*; Bul. N. P. 34 a (7th ed.); Shep. Touch. by Preston, pp. 244, 472; Went. Off. Executors, p. 146. And see *Cox v. Godsalve*, 6 East, 604 *in notis*; *West v. Moore*, 8 East, 339; *Cooper v. Woolfitt*, 2 H. & N. 122. See also Harg. Co. Lit. 55 b (N. 365), where it is said that it is not easy to account for the distinction which gives corn growing to the devisee, but denies it to

the heir, though it has been attempted.

(*k*) *In re Roose*, 17 Ch. D. 696. See the authorities in the last note, and *Rudge v. Winnall*, 12 Beav. 357. As to who may devise emblems, see Vin. Ab. tit. Devise (I. 5).

(*l*) Co. Lit. 56 a; *Hayling v. Okey*, 8 Exch. 531, 545.

(*m*) See Plowden's Quæries, No. 239; and see *per* Bayley, J., in *Evans v. Roberts*, 5 B. & C. at p. 835.

landlord's interest, are now regulated by a statute passed Chap. IV. s. 3. in 1851 (*n*). As, however, that enactment does not affect the question of emblements as between the heir and executor of a deceased owner of an estate of inheritance, it is thought to be unnecessary in this place to discuss its provisions (*o*).

(*n*) 14 & 15 Vict. c. 25, s. 1. On the provisions of this statute, see *Haines v. Welch*, L. R., 4 Ex. 91; *Lord Stradbroke v. Mulcahy*, 2 Ir. C. L. R. 406; *Hyde v. Roche*, 5 Ir. C. L. R. 195; *Flanagan v. Seaver*, 9 Ir. Ch. R. 230; *Kelly v. Webber*, 11 Ir. C. L. R. 57; *Short v. Atkinson*, 1 Hayes & Jones, 682; *Kenna v. Nugent*, 6 Ir. R. C. L. 547.

(*o*) The reader who may be desirous of pursuing the sub-

ject of emblements further, will find the doctrine very fully treated of in Co. Lit. 55 b; in Perkins, § 512 *et seq.*; in Gilbert, Evid. 208 *et seq.*; and in Com. Dig. tit. Biens (G.); Vin. Ab. tit. Emblements, and Executor, with Mr. Serjt. Hill's Notes in Linc. Inn Library; and Bac. Ab. tit. Executors. See also Williams' Executors, vol. 1, p. 713 (8th ed.); and the note to *Graves v. Weld*, in 2 N. & M. at p. 734.

CHAPTER V.

OF THE TRANSFER OF FIXTURES.

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SECTION I.

Of the Transfer of Fixtures by Sale.

Part I.

In the present chapter it is proposed to consider in what cases fixtures will pass by the terms of a conveyance, whether it be by grant, mortgage, lease, devise, or other species of alienation; and to point out the questions of law which ordinarily occur upon the transfer of property of this description; and such also as arise in the event of bankruptcy.

Buildings
pass on sale
of land.

And, first, as to a conveyance by sale:—it is to be observed, that in general under the name of land are comprised all buildings and erections affixed to the soil. The term *land* has accordingly been held to convey houses, &c., erected thereon, although not mentioned, and notwithstanding other houses and buildings are specifically described in the conveyance (a). Upon this principle it was laid down, in very early times, that where mere personal chattels are annexed to the freehold, they are made incident to the freehold, and will be included in a conveyance of the land

So, chattels
annexed.

(a) Com. Dig. tit. Grant (E. 3); Co. Lit. 4 a; Roll. Ab. tit. Graunts (T.); *Archer v. Bennett*, 1 Lev. 131. See now the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 2, 6, *post*, p. 278.

in general terms. And therefore in the Year-Book, 21 Hen. 7, p. 26, it was said, that vats fixed in a brewhouse or dyehouse should always go with the freehold and pass by feoffment together with the inheritance. Chap. V. s. 1.

This doctrine has been generally recognized in the more modern determinations (b). It will be sufficient to refer by way of illustration to the case of *Colegrave v. Dias Santos* (c), in which the subject was much discussed by the Court of King's Bench. There the plaintiff being the owner of a freehold house, advertised it for sale; and printed particulars were circulated, which took no notice of certain fixed articles, consisting of mash tubs, grates, closets, shelves, &c., which were fixed in and belonged to the house. The defendant becoming the purchaser, the house was conveyed to him, and possession given, the fixed articles still remaining in the house. Afterwards the plaintiff insisted that a valuation of these things should be made, and that the defendant should pay for them; but the latter contended that they passed to him together with the freehold, and refused to pay for them or deliver them up. Upon these facts the Court held, that the articles in question passed to the defendant, together with and as part of the house. They said that the plaintiff ought to have insisted upon his right before he executed the conveyance; for if he might afterwards insist on payment for the utensils, he might also after the sale of the house refuse to sell what was affixed to it, and might do great injury to the house by taking them away. If the house descended,

*Colegrave v.
Dias Santos.*

(b) *Ryall v. Rolle*, 1 Atk. at p. 175, per Parker, C. B.; *Hitchman v. Walton*, 4 M. & W. at p. 416, per Parke, B.; *Ex parte Barclay, In re Gawan*, 5 D., M. & G. at p. 410. Thus, a removable windmill will pass with the land, *Steward v. Lombe*, 1 Brod. & Bing.

506, per Richardson, J.; so of machinery in a mine or a factory, *R. v. Bilston*, 5 B. & C. at p. 854, per Bayley, J.; *Mather v. Fraser*, 2 K. & J. 536, 544. And see cases on Mortgage, cited *post*, p. 293 *et seq.*

(c) 2 B. & C. 76.

Part I.

the articles in question would descend to the heir ; so also if it had been devised ; and the law was considered to be the same in the case of a purchase.

Decisions at
variance with
rule con-
sidered.

It is, however, proper to mention, that there are two cases which appear to be in some degree at variance with the principles laid down in the decisions alluded to. For in the case of *Ex parte Quincy* (*d*), Lord Hardwicke seems to have been of opinion, that the fixed utensils of a brew-house would not pass by a conveyance of the brewhouse with the appurtenances. And in another case, *Beck v. Rebow* (*e*), it was held, that a covenant to settle a house and all things fixed to the freehold of the house, did not comprise certain matters of ornament which at the time of the deed were affixed to the house, and united to it by screws and nails. But of the former of these cases, it may be observed that it was never finally determined (*f*). And with respect to the case of *Beck v. Rebow*, it is particularly to be remarked, that the property in dispute appears to have been of a description similar to that which in other cases has been held removable as between heir and executor. It may therefore be thought, perhaps, that without infringing the rule in ordinary cases, the Court considered that articles of this description, which are so much in the nature of personalty as to be assets in the hands of the executor, might be an exception to the general rule, and ought not in strictness to be comprehended under the general terms of a conveyance (*g*).

Executor's
fixtures,
whether they
also pass.

It is observable that the distinction here suggested seems to derive support from some expressions of the Court in the case of *Colegrave v. Dias Santos*, above cited. The principle, however, has not been recognized in any other determina-

(*d*) 1 Atk. 477.

(*e*) 1 P. Wms. 94.

(*f*) The conveyance was by way of mortgage. See re-

marks on this case, *post*, p. 293 *in notis*.

(*g*) See *ante*, pp. 243, 248.

tion; and, on the contrary, it appears from the whole current of authorities referred to in the course of this work, that things fixed to the freehold are, in all cases, to be deemed essential parts of the freehold, while they subsist in a state of annexation, notwithstanding they may be subject to a right of being afterwards severed from the freehold, and converted into personal chattels (*h*). Thus, in *Gibson v. Hammersmith Railway Co.* (*i*), it was argued that a railway company compulsorily purchasing land on which was a manufactory were not bound to take fixed machinery in the manufactory, because such machinery would have been removable by a tenant as trade fixtures, and was therefore not to be considered as part of the manufactory. Kindersley, V.-C., however, held that the company must take the machinery as well as the building in which it was fixed, for that both were equally a part of the land and therefore passed with it.

Chap. V. s. 1.

*Gibson v.
Hammersmith
Rail. Co.*

The doctrine under consideration applies equally whether the interest of the vendor in the land be freehold or leasehold; for an assignment of all a leaseholder's interest in the property itself, as distinguished from the fixtures, carries with it also the interest in the fixtures attached to the property (*j*).

Fixtures pass,
whether pro-
perty freehold
or leasehold.

Moreover, a similar rule obtains with respect to personal chattels which are *incident* to the freehold; these also will pass by a grant of the freehold itself, although at the time of the grant they are actually severed from it. And, therefore, by a conveyance or lease of a house, the doors, windows, locks, keys, and rings of the house will pass,

So where
things con-
structively
annexed.

(*h*) See *ante*, Chap. I. p. 28.

(*i*) 32 L. J., Ch. 337; see also *Thresher v. East London Waterworks Co.*, 2 B. & C. 608; and *ante*, p. 156 *et seq.*

(*j*) *Meux v. Jacobs*, L. R.,

7 H. L. 481, 491; *Ex parte Barclay, In re Gawan*, 5 D., M. & G. at p. 410. And see the cases on Mortgage cited *post*, p. 294 *et seq.*; and so of copyholds, *id.* note (*r*).

Part I.

although they may be distinct things; because they are constructively annexed to the house. So, by a grant of a mill, the mill-stone passes, notwithstanding at the time of the conveyance it is severed from the mill and removed for a temporary purpose; for it still remains, in contemplation of law, parcel of the mill (*k*). And, in connection with this, it may be remarked that even a chattel, such as a granary resting on staddles by its own weight only, may pass without special mention, if from the rest of the conveyance an intention that it should pass is apparent (*l*).

Provisions of
Conveyancing
Act, 1881.

With respect to conveyances made on or after the 1st of January, 1882, it has now been expressly provided by the Conveyancing and Law of Property Act, 1881 (*m*), that a conveyance of land (*n*) shall be deemed to include, and shall by virtue of the Act operate to convey with the land all buildings, erections, fixtures, &c., appertaining or reputed to appertain to the land or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof. The Act further provides

(*k*) *Walmsley v. Milne*, 7 C. B., N. S. 115, 138; *Mather v. Fraser*, 2 K. & J. at pp. 550, 551; *Metrop. Counties, &c. Society v. Brown*, 26 Beav. 454, 459; and see *Shep. Touch.* 90; *Liford's case*, 11 Co. at p. 50 b; *R. v. Wheeler*, 6 Mod. 187; *Went. Off. Executors*, p. 150; *Martyr v. Bradley*, 9 Bing. 24; *Fisher v. Dixon*, 12 Cl. & F. 312, 330; and see *ante*, p. 20. As to detached pipes and conduits passing by a grant of a house, see *Nicholas v. Chamberlain*, Cro. Jac. 121; *Archer v. Bennett*, 1 Lev. 131; *Gennings v. Lake*, Cr. C. 122.

(*l*) *Wiltshear v. Cottrell*, 1 E. & B. 674, 691.

(*m*) 44 & 45 Vict. c. 41 (amended by 45 & 46 Vict. c. 39), s. 6. This section only applies so far as a contrary intention is not expressed in the conveyance. *Ib.*

(*n*) Conveyance, unless a contrary intention appears, includes assignment, appointment, lease, settlement, and other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property. Sect. 1.

that a conveyance of land, having houses or other buildings thereon, shall in like manner be deemed to include and operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, court-yards, &c. Chap. V. s. 1.

It may, therefore, be accepted as a general proposition that by a conveyance of a freehold, or assignment of a leasehold interest in land, all things annexed to the soil will pass with it as parcel thereof. And it appears from the observations of the Court in the case of *Thresher v. East London Waterworks Co.* (o), that the circumstances must be very special which would prevent the operation of this general principle (p).

On the other hand, notwithstanding there may be general words in a conveyance, &c., which would include fixtures, yet if it can be collected from the deed itself that these words are qualified by other stipulations found in the deed, so as to make it appear that the intention of the parties was restrictive of the general terms employed, in such a case the *prima facie* inference arising from the general expressions is modified and controlled. The case of *Hare v. Horton* (q) affords an example of such a qualification of the general rule. In that case a party, in a conveyance by way of mortgage, conveyed an iron-foundry, dwelling-houses, &c., with the appurtenances; together with all grates, boilers, bells, and other fixtures in the said dwelling-houses; and all trees, houses, &c., to the said

Fixtures do not pass if contrary intention.

(o) 2 B. & C. 608.

(p) As to the effect of collateral circumstances *dehors* the instrument, see *Colegrave v. Dias Santos* (2 B. & C. 76), in respect of there being no stipulation for the appraisal of fixed articles on the sale of a house. So, *Ex parte Quincy*

(1 Atk. at p. 478), in respect of there being no consideration. See also *Doe d. Freeland v. Burt*, 1 T. R. 701; Phillips on Evidence, 10th ed. vol. 2, p. 378; Taylor, *id.* 7th ed. p. 997. And see *ante*, p. 160.

(q) 5 B. & Ad. 715.

Part I.

foundry, messuages and lands appertaining. There were in the foundry certain cranes and presses, a steam engine, and other fixtures used for the purposes of the business carried on there, and valued at 600*l*. It was held that the specification of the grates and fixtures in the dwelling-house excluded the articles in the foundry, and showed that the latter were not intended to pass; though it was admitted that they would have passed under the general terms in the granting part of the deed, if the others had not been mentioned (*r*). But unless there be some particularity in the other stipulations in the deed—as, from the limitation of the articles specified to one particular *genus*—general words in a deed will not be so restricted (*s*).

Property in things annexed by purchaser of land, when purchase not completed.

Before leaving this part of our subject it may be useful to refer to the American case of *The Hinkley and Egery Iron Co. v. Black* (*t*), with reference to the property in fixtures annexed to land by a person during his possession under an uncompleted agreement for purchase of the land. There the defendant agreed to sell and convey certain land to one H., who was to have immediate possession, the purchase-money being payable in instalments. H. went into possession and erected large and substantial buildings and machinery for the purpose of a manufactory, and subsequently made a personal mortgage of them to the plaintiffs. H. having made default in payment of the instalments, and having become bankrupt before he was entitled to a conveyance, the defendant re-entered on the land and took

(*r*) See, too, *Bishop v. Elliott*, 24 L. J., Ex. 229.

(*s*) See *Mather v. Fraser*, 2 K. & J. 536; *Haley v. Hammersley*, 3 D., F. & J. 587; and cases cited *post*, p. 296 *et seq.*

(*t*) 35 Am. Rep. 346. It has been held also in America that where a hirer of chattels affixed them to the realty in

such a manner that they could not be removed without injury to it, a purchaser of the realty, without notice, was entitled to hold the chattels affixed as against the lender, who must look to the hirer for compensation. *Fryatt v. The Sullivan Co.*, 5 Hill's N. Y. Rep. 116; 7 *id.* 529.

possession of the buildings and machinery. It was held Chap. V. s. 1. that as the buildings and machinery had become part of the realty on annexation, they passed as such to the defendant on H.'s failure to complete, and that they were not the personal property of the plaintiffs under their mortgage.

It is manifest that fixtures may be sold either together Bills of sale. with, or separately from the land to which they are annexed. And in such cases, where the land and fixtures, or the fixtures, are allowed to remain in the possession of the vendor, questions frequently arise between creditors of the latter and a purchaser claiming under an agreement for sale which amounts to a transfer of property *in præsenti*, although there was no transfer of possession. Such agreements are denominated bills of sale (*u*). Most usually bills of sale of fixtures are in the nature of mortgages of the property comprised in them, and as such will fall within the subject of the next section. But in some cases the bill of sale amounts to an absolute assignment of the property, and it is with reference to such cases that the following remarks are made.

The rights of persons claiming under bills of sale of fixtures are now regulated by the Bills of Sale Act, 1878, as amended by the Bills of Sale Act (1878) Amendment Act, 1882 (*v*), the principal object of which may be said to be to establish a system of registration of the documents, and thus to avoid the secrecy arising from a continuance of the vendor's possession and apparent ownership after

(*u*) *Brantom v. Griffiths*, 2 C. P. D. at p. 214.

(*v*) 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43. The Act of 1882 purports to apply only to bills of sale given by way of security for payment

of money (sect. 3), and its provisions will therefore be considered in the next section. See *Swift v. Pannell*, 48 L. T. 351; *Ex parte Izard, In re Chapple*, 23 Ch. D. 409, 413; and *post*, p. 305.

Part I.

the sale of the fixtures. It would occupy too much space in the present treatise if an attempt were here made to examine at any length the provisions of these Acts, and it is proposed, therefore, simply to point out to the reader the provisions which are more immediately connected with our present subject, referring him for further information to works in which the statutes in question are treated of more exhaustively (*w*).

When registration formerly unnecessary.

Where fixtures passed without mention by a conveyance or assignment of the land to which they were annexed, registration was not necessary under the former Bills of Sale Acts (*x*), which required registration only where there was a separate assignment of the fixtures. But in the construction of those Acts there was a considerable diversity of judicial opinion as to what constituted such a separate assignment when the land and the fixtures passed by the same instrument. It is unnecessary, however, to consider the distinctions established by the cases, inasmuch as the Act of 1878 contains an express provision on the subject (*y*).

Bills of Sale Act, 1878.

This Act, which extends to England only, came into operation on the 1st of January, 1879, and applies to every bill of sale executed on or after that date, whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale (*z*).

Bill of sale, meaning of, in Act.

The expression "bill of sale" in the Act includes bills of sale, assignments, transfers, declarations of trust with-

(*w*) *E. g.*, Prideaux, *Prec.* (12th ed.) 685 *et seq.*; Benjamin on Sales (3rd ed.), p. 463 *et seq.*; Pearce on Bills of Sale, *passim*.

(*x*) 17 & 18 Vict. c. 36; 29 & 30 Vict. c. 96.

(*y*) *Post*, p. 284.

(*z*) Sects. 2, 3.

out transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred, but it does not include (*inter alia*) assignments for the benefit of the creditors of the person making or giving the same, or marriage settlements (*a*). With reference to this it must be remarked that although falling within the terms of the above definition, a document is not a bill of sale within the Bills of Sale Acts, 1878 and 1882 (*b*), unless it be a document on which the title of the transferee depends, either as an actual transfer of the property, or an agreement to transfer, or as a muniment or document of title taken at the time as a record of the transaction. If, therefore, the transaction of purchase and sale is completed before the document is given or asked for, registration is not required (*c*).

Every bill of sale of "personal chattels" to which the Act applies (*d*) is to be duly attested and registered under the Act within seven days after the making or giving thereof, and is to set forth the consideration for which such bill of sale was given (*e*). The expression "personal chattels" means and includes *for the purposes of the Acts* (*f*), (*inter alia*) fixtures and growing crops (*g*) when separately assigned or charged, but does not include

Personal
chattels,
meaning of,
in Act.

- | | |
|--------------------------------------|--|
| (a) Sect. 4. | (f) <i>Meux v. Jacobs</i> , L. R., |
| (b) See 45 & 46 Vict. c. 43, | 7 H. L. 481. |
| s. 3. | (g) Growing crops did not |
| (c) <i>Marsden v. Meadows</i> , 7 | fall within the former Act. |
| Q. B. D. 80, 84. | <i>Brantom v. Griffiths</i> , 2 C. P. D. |
| (d) <i>Supra</i> , p. 281, note (v). | 212; <i>Ex parte Payne</i> , 11 Ch. |
| (e) Sects. 8, 10. | D. 539. |

Part I.

No separate assignment where the land passes by same instrument.

fixtures (except trade machinery as hereinafter defined (*h*)) when assigned together with a freehold or leasehold interest (*i*) in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow (*j*). No fixtures or growing crops are to be deemed to be separately assigned or charged *by reason only* that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, or from the land on which they grow, without otherwise taking possession of or dealing with such land or building, or land, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed, or in the land on which such crops grow, is also conveyed or assigned to the same persons or person (*k*). And this rule of construction is to be applied to all deeds or instruments, and not only to such as are executed upon or after the 1st of January, 1879 (*l*).

Application of Act to trade machinery.

The Act of 1878 drew a distinction for the first time between fixed trade machinery and other fixtures. By

(*h*) *Post*, p. 285.

(*i*) Or, *semble*, copyhold interest; see *post*, p. 294, note (*r*).

(*j*) Sect. 4.

(*k*) Sect. 7. It is apprehended that a conveyance or assignment to the same person but in a different character (*e. g.*, as a trustee) would not be within this provision.

(*l*) *Ib.* As to the effect of this section, see *Ex parte Moore & Robinson's Banking Co.*, 14 Ch. D. 379, 387. The section practically overrules the distinctions established by the following cases:—*Begbie v. Fenwick*, L. R., 8 Ch. 1075 *in notis*; *Hawtry v. Butlin*,

L. R., 8 Q. B. 290; *Ex parte Daglish*, L. R., 8 Ch. 1072; *In re Eslick*, *Ex parte Alexander*, 4 Ch. D. 503; *Ex parte Brown*, *In re Reed*, 9 Ch. D. 389; and also it would seem, *In re Trethowan*, *Ex parte Tweedy*, 5 Ch. D. 559. The words “by reason only” in the above section are important, as showing that the Court would still be at liberty to determine from all the circumstances of the case that there was a separate transaction as to the fixtures, although by the same instrument some interest in the land passed to the purchaser.

section 5 it is enacted that from and after the 1st of January, 1879, trade machinery shall, *for the purposes of the Act*, be deemed to be personal chattels, and any mode of disposition of trade machinery by the owner thereof, which would be a bill of sale as to any other personal chattels, shall be deemed to be a bill of sale within the meaning of the Act. For the purposes of the Act, "trade machinery" means the machinery used in or attached to any factory or workshop (*m*); exclusive of

Chap. V. s. 1.

- (1.) The fixed motive powers, such as the waterwheels and steam engines, and the steam boilers, donkey-engines, and other fixed appurtenances of the said motive powers.
- (2.) The fixed power machinery, such as the shafts, wheels, drums, and their fixed appurtenances, which transmit the action of the motive powers to the other machinery, fixed and loose.
- (3.) The pipes for steam, gas, and water in the factory or workshop.

The same section provides that the machinery or effects excluded thereby from the definition of trade machinery are not to be deemed to be "personal chattels" within the meaning of the Act.

As regards the necessity for registration of bills of sale of fixtures, where the fixtures are intended to remain in the possession of the vendor, the effect of the foregoing provisions may perhaps be shortly summarized as follows. Registration should be effected in the cases of—

Cases in which
registration
necessary.

- (A) A bill of sale of any fixtures neither falling within nor expressly excluded from the definition of

(*m*) "Factory or workshop" means any premises on which any manual labour is exercised by way of trade, or for purposes of gain, in or incidental to the following purposes or any of them:—

viz., the making any article or part of an article; or the altering, repairing, ornamenting, finishing, of any article; or the adapting for sale any article (sect. 5).

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“trade machinery” given above, where no interest in the land or building to which they are annexed passes to the purchaser by the same instrument, or (*semble*) where the interest given in the land is colourable only.

- (B) A bill of sale of fixed trade machinery (*n*) falling within the definition of “trade machinery” given above, whether assigned together with or separately from any interest in the factory or workshop to which they are attached, and (*semble*) though passing by a mere conveyance or assignment of the factory or workshop containing no mention of fixtures.

Cases in which
registration
not necessary.

On the other hand registration is not necessary in the cases of—

- (C) An instrument conveying or assigning any interest in land or buildings without mention of fixtures, but by which fixtures, not being “trade machinery,” pass to the grantee or assignee.
- (D) An instrument conveying or assigning an interest in land or buildings, and also expressing to operate as an assignment to the same person of the fixtures attached thereto; notwithstanding that the fixtures are assigned by a separate *testatum*, or that power is given to the assignee to sever the fixtures without taking possession of, or otherwise dealing with the land or buildings (*o*).
- (E) An assignment, whether separately or together with any interest in the factory or workshop to which they are attached, of fixed motive powers (*p*), or fixed power machinery (*q*), or pipes for steam, gas and water in any factory or workshop.

(*n*) *E.g.*, looms, circular saws, &c., in a factory.

(*o*) But see *ante*, p. 284, note (*l*).

(*p*) *E.g.*, water-wheels, steam-engines, &c.

(*q*) *E.g.*, shafts, drums, &c.

Sect. 8 in effect enacts that if the provisions of the Act as to registration, attestation, or the setting forth of the consideration of a bill of sale are not complied with, the bill of sale shall, as regards any property comprised therein which may be in the possession or apparent possession (*r*) of the grantor (*s*), be void as against (1) trustees in bankruptcy (*t*); (2) sheriffs' officers and all persons acting in the execution of the process of any Court (*u*) authorizing the seizure of the property; and (3) all persons on behalf of whom such process shall have been issued. This section is repealed by the 15th section of the Act of 1882, but it seems that this repeal has reference only to bills of sale given by way of security for the payment of money, and that this section is unrepealed and still operative so far as regards absolute assignments (*x*). The result of a non-compliance with the above provisions of the Act of 1878, however, is only to avoid the bill of sale as against the persons specified, but not as against the grantor (*y*).

Chap. V. s. 1.

Consequence of non-compliance with provisions of Act.

(*r*) Sect. 4 provides that "personal chattels" (which term, for the purposes of the Act, includes, as we have seen, some fixtures, see *supra*, p. 283) "shall be deemed to be in the 'apparent possession' of the person making or giving a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person." As to this, see *Ex parte National Guardian Assurance Co.*, 10 Ch. D. 408; *Ex parte Saffery*, 16 Ch. D. 668.

(*s*) Where a bill of sale of

fixtures was made by two partners, A. and B., but was not registered, and the partnership having been subsequently dissolved, B. assigned his share to A.; it was held that upon the bankruptcy of A. whilst in possession of the fixtures, his trustee was entitled to the moiety to which A. was entitled at the date of the bill of sale, but not to the moiety afterwards assigned by B. *Ex parte Brown, In re Reed*, 9 Ch. D. 389.

(*t*) See *post*, p. 308 *et seq.*

(*u*) See *post*, p. 393 *et seq.*

(*x*) See 45 & 46 Vict. c. 43, s. 3; *Swift v. Pannell*, 48 L. T. 351; *Ex parte Izard*, 23 Ch. D. 409, 413.

(*y*) *Davis v. Goodman*, 5 C. P. D. 128. For the reasons given above, this case is pre-

Part I.

Fixtures in possession of grantor upon his bankruptcy.

Section 20 (z) excludes chattels comprised in a duly registered bill of sale from the operation of the reputed ownership clause of the Bankruptcy Act, but this section does not enlarge the right of a grantee of fixtures under such a bill of sale, for he is entitled to them although the grantor becomes bankrupt and they remain in his possession at the commencement of the bankruptcy, because, as will be seen hereafter (a), the provisions of the Bankruptcy Act on this subject are not applicable to fixtures.

Stipulations respecting fixtures.

From the general principle that fixtures pass by a sale of the land to which they are annexed, some practical inferences may be deduced, to which it will be useful to draw the reader's attention, with reference to the precautions to be used in purchasing houses, &c., and taking leases or assignments of premises with the fixtures and other appendages belonging to them. Thus, upon an agreement for the sale of a house, if it is intended that things of a personal nature which are attached to the house should not be included in the purchase, it is, in general, necessary to make an express reservation of them: and it will be a very convenient practice to provide in the agreement or instrument of conveyance, that the excepted articles should be taken at an appraisement, or at a valuation to be made in some appointed mode (b).

sumably still applicable to bills of sale which are absolute assignments; but as to bills of sale given as security for payment of money, see now 45 & 46 Vict. c. 43, ss. 8, 10, *post*, p. 307.

(z) That the repeal of this section by 45 & 46 Vict. c. 43, s. 15, is partial only, see *Swift v. Pannell*, 48 L. T. 351, *ante*, p. 281, note (v), and *post*, p. 307.

(a) *Post*, pp. 309, 317.

(b) It will be found very useful in practice, whenever premises containing fixtures are sold, demised or assigned, that the conveyance should be accompanied by a schedule, specifying the particular articles which are intended to be valued. See Bac. Ab. tit. Leases (A.); Bull. N. P. 156 b (7th ed.); and *post*, Appendices (C), (D). And see *Sharp v. Milligan*, 23 Beav. 419. For precedents of conditions of sale

It frequently happens that in agreements of sale, and in a demise of premises, there is an express stipulation that "the fixtures are to be taken at a valuation;" and difficulties repeatedly arise as to what particular articles are to be included in this provision, and for which the purchaser or tenant may be called upon to pay (c). With respect to the precise import of these terms in different cases, there is very little assistance to be derived from the authorities; and the practice of the individuals who are usually referred to on these occasions, seems to be governed by no uniform or very definite rule. It would seem, however, that when a stipulation of this kind occurs on the sale of a house, those things only are, in strictness, to be comprehended in the valuation, which would be deemed personal assets as between heir and executor, and which would not pass with the inheritance as part of the freehold of the house.

Chap. V. s. 1.

Fixtures to be taken at a valuation.

Effect of this stipulation on sale of a house;

When the like stipulation occurs upon a demise of premises, it must, it is conceived, be interpreted to mean, that all those articles are to be valued to the incoming tenant, which would be fixtures as between a landlord and tenant, and which the tenant would be at liberty to remove, if he had himself put them up during the term. It is apprehended, therefore, that the tenant will not be bound to pay for any thing but what properly falls within the rule here suggested. So, where a tenant by assignment of his lease pending the term, or at his out-going, disposes of his fixtures under a similar agreement, he may be considered as

On a demise;

On assignment.

providing for valuation of fixtures, see 1 Prid. Prec. p. 42 (12th ed.); Wolst. & Turn. Conv. Acts, p. 189 (3rd ed.).

(c) Where the agreement which contains the stipulation provides for valuation by a particular person, the Court will make a mandatory order

upon the vendor to compel him to allow such person to enter upon the premises and make the valuation. *Smith v. Peters*, L. R., 20 Eq. 511. As to the circumstances in which a valuer's award becomes final, see *Freeman v. Jeffries*, L. R., 4 Ex. 189.

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Demise where
no mention of
fixtures.

Lastly, if, at the time of making a demise, nothing is said respecting the fixed articles belonging to the premises, the tenant will be entitled to the use of them during the term as part of the demise; and the landlord cannot afterwards remove them, neither can he insist upon their being valued, or that any additional consideration shall be paid for them. Thus, where a party accepted a demise of a house containing fixtures and took possession, and there was no proof of any agreement that he should pay for the fixtures, it was held that the acceptance of the demise and taking to the fixtures did not raise an implied contract to pay for them (*k*).

(*k*) *Goff v. Harris*, 5 M. & G. 573. And see the same case, as to the effect of paying money into Court as an admission of a liability in respect of the fixtures; see, however, on this point, R. S. C., 1883, Ord. XXII., rr. 1, 6.

SECTION II.

Of the Transfer of Fixtures by Mortgage.

WITH respect to the transfer of fixtures by way of mortgage, it is to be observed, in the first place, that this species of property may be mortgaged, as it may be sold, either in connection with or in separation from the realty. It was long since established that in the case of a conveyance of land by way of mortgage, as well as in that of a conveyance of any other description, all things annexed so as to become fixtures pass with the mortgaged premises and constitute a part of the mortgagee's security, and that this is so although the deed contains no mention of fixtures. The result of the authorities is that the maxim *quicquid plantatur solo solo cedit* applies in all its integrity to the relation of mortgagor and mortgagee (*l*). The case of *Longstaff v. Meagoe* (*m*) may be cited as an express authority in favour of this rule. The action was in trover for certain counters, presses, grates, coppers, workboards, cupboards, glazed doors, moveable partitions, &c. The lessee of a house

Chap. V. s. 2.

Things affixed
pass by a
mortgage of
the land.

Longstaff v.
Meagoe.

(*l*) *Ex parte Cowell*, 12 Jur. 411; *S. C.* 17 L. J., Bkcy. 16; *Ex parte Barclay, In re Gawan*, 5 D., M. & G. 403; *Mather v. Fraser*, 2 K. & J. 536; *Boyd v. Shorrocks*, L. R., 5 Eq. 72; *Climie v. Wood*, L. R., 3 Ex. 257, 262, *S. C.* in Ex. Ch., L. R., 4 Ex. 328; *Longbottom v. Berry*, L. R., 5 Q. B. 123; *Holland v. Hodgson*, L. R., 7 C. P. 328, 333; *Meux v. Jacobs*, L. R., 7 H. L. 481; *Cross v. Barnes*, 46 L. J., Q. B. D. 479; *Ex parte Punnett*, 16 Ch. D. 226. An opinion

to the contrary, expressed by Lord Hardwicke, in *Ex parte Quincy* (4 Atk. 177), is at variance with the modern authorities, and also with his lordship's decision in a prior case of *Ryall v. Rolle*, 1 Atk. 165. And see Powell on Mortgages, p. 39 a; Sugden's Vendors & Purchasers, p. 33 (14th ed.); Coote on Mortgages, p. 440 *et seq.* (4th ed.); Fisher on Mortgages, p. 28 *et seq.* (3rd ed.).

(*m*) 2 A. & E. 167.

Part I.

containing these fixtures executed an assignment of the premises by way of mortgage, not mentioning the fixtures; and afterwards he assigned the premises and all his estate and effects to trustees. The trustees being in treaty for a sale of the fixtures to a third party, the mortgagee, whose principal and interest were due, took forcible possession of the house, and refused on demand to deliver up the fixtures; whereupon the trustees brought an action of trover. It was held that they were not entitled to recover the fixtures, as against the claim of the mortgagee. So in the case of *Climie v. Wood* (n) it was held that a mortgage of a piece of land included a steam engine and boiler standing upon and annexed to it.

So things
constructively
annexed.

And the same rule holds in respect of chattels which are constructively annexed. Thus by a mortgage of a mill, the stones, tackling and implements necessary for the working of the mill pass to the mortgagee (o). And so by a mortgage of land and machines, articles which are essential parts of the machines will pass though unattached; and even duplicates of such articles may be included in the mortgagee's security (p). On the other hand, machines will not pass by a mortgage of the soil or a building, where, although they are placed in prepared receptacles, there is no annexation (q).

Fixtures pass,
whether pro-
perty freehold
or leasehold.

The above rule clearly applies whether the mortgagor be a freeholder (r) or a leaseholder, and a mortgage of a

(n) L. R., 4 Ex. 328.

(o) *Place v. Fagg*, 4 M. & R. 277; *Walmsley v. Milne*, 7 C. B., N. S. 115, 135.

(p) *Ex parte Astbury*, L. R., 4 Ch. 630; *Mather v. Fraser*, 2 K. & J. 536, 559; *Metrop. Counties, &c. Society v. Brown*, 26 Beav. 454, 459; and see *ante*, pp. 20, 277.

(q) *Hutchinson v. Kay*, 23 Beav. 413; *Ex parte Astbury*, L. R., 4 Ch. 630, 638; and see *ante*, p. 5.

(r) That a mortgage of copyholds carries fixtures, see *Ex parte Reynal*, 2 M., D. & D. 443. In that case the mortgage was by a covenant to surrender, and the surren-

lease carries with it the fixtures on the demised premises (s); Chap. V. s. 2. for so long as the term subsists they have, as we have seen, no existence apart from the soil or building to which they are annexed (t). But as regards the extent of the interest which the mortgagee takes in the fixtures, a distinction exists between a mortgage by way of assignment of a lease, and a mortgage by way of underlease. In the case of an assignment, the whole of the mortgagor's interest in the premises passes to the mortgagee, and, therefore, he is entitled to all the mortgagor's rights in respect of the fixtures, including, of course, the right of severance of tenant's fixtures (u). But in the case of a mortgage by underlease, the mortgagee is entitled only to the use of the fixtures for the term, and the right to sever them still remains in the mortgagor unless there is a clear intention, to be gathered from the terms of the mortgage deed, to convey the absolute interest in the fixtures, as well as the limited interest in the land (x).

Distinction between mortgage by assignment and by underlease.

Moreover, as regards the general rule, there is no distinction in respect of fixtures which are annexed by the mortgagor subsequent to the mortgage. For the security extends alike to all, and the mortgagee is entitled to every thing he finds affixed to the mortgaged premises (y).

Things pass, though annexed after the mortgage;

der having been made, but there having been no admittance of the mortgagee, Mr. Commissioner Holroyd held that this amounted to an equitable mortgage.

(s) *Ex parte Barclay, In re Gawan*, 5 D., M. & G. 403; *Longstaff v. Meagoe*, 2 A. & E. 167; *Boyd v. Shorrocks*, L. R., 5 Eq. 72; *Ex parte Astbury*, L. R., 4 Ch. 630, 637; *Meux v. Jacobs*, L. R., 7 H. L. 481; *Irish Civil Service, &c. Society v. Mahony*,

Ir. R., 10 C. L. 363.

(t) *Ante*, p. 27.

(u) See *Meux v. Jacobs*, L. R., 7 H. L. at p. 491, *per* Lord Hatherley.

(x) *Hawtry v. Butlin*, L. R., 8 Q. B. at pp. 293, 295; *Ex parte Daglish*, L. R., 8 Ch. 1072; *Ex parte Barclay, In re Joyce*, L. R., 9 Ch. 576; *In re Eslick, Ex parte Alexander*, 4 Ch. D. 503.

(y) *Walmsley v. Milne*, 7 C. B., N. S. 115, 138; *Acroyd v. Mitchell*, 3 L. T. 236; *Cull-*

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And though
annexed out
of a partner-
ship fund.

So, whether the fixtures have been added by the mortgagor himself, or in partnership with others and at their joint expense. As where a trader mortgages his premises, and then enters into a partnership, and the firm continue to carry on the business on the same premises, and erect additional fixtures thereon; the mortgagee is not affected by, and has no concern with the question of, the partnership claims, but he is entitled to everything belonging to the estate, as against the mortgagor (z).

Fixtures do
not pass if
contrary
intention.

But although fixtures in general pass by a mortgage of the land to which they are attached, yet, as in the case of an ordinary conveyance on sale (a), if a contrary intention can be collected from the mortgage deed itself, they will not so pass. Thus, in the case of *Hare v. Horton* (b), noticed at length in a preceding page, the Court distinctly recognize the principle that under a conveyance of land by way of mortgage, property affixed thereto would in general pass, and that there was no distinction between such a conveyance, and a general conveyance by sale, &c.: but they thought that in this case it was to be collected from the terms of the deed itself, that the trade fixtures in dispute were never intended by the parties to be included in the mortgage. So likewise in the case of *Trappes v. Harter* (c), it was held that certain fixed machinery did not pass to the mortgagee; and this,

wick v. Swindell, L. R., 3 Eq. 249; *Cross v. Barnes*, 46 L. J., Q. B. D. 479, 481; *Irish Civil Service, &c. Society v. Mahony*, Ir. R., 10 C. L. 363. And see *Climie v. Wood* (in Ex.), L. R., 3 Ex. 257, 260; *Meux v. Jacobs*, L. R., 7 H. L. at pp. 491, 493; *Ex parte Punnett*, 16 Ch. D. at p. 236, per Lush, L. J. See also *Ex parte Belcher*, 2 Mont. & Ayr. 160; *Ex parte Price*, 2 M., D. & D.

518; *Ex parte Reynal*, id. 443.

(z) *Ex parte Cotton*, 2 M., D. & D. 725; *Cullwick v. Swindell*, L. R., 3 Eq. 249. And see *Climie v. Wood*, L. R., 3 Ex. 257; affirmed in Ex. Ch., L. R., 4 Ex. 328.

(a) As to which, see *ante*, p. 279.

(b) 5 B. & Ad. 715.

(c) 2 Cr. & M. 153; and see *Waterfall v. Penistone*, 6 E. & B. 876, 890.

although the mortgage deed contained an express mention of fixed property in very general terms. But the Court came to that conclusion from the very special circumstances of the case, for they considered that it appeared from the facts of the case that the fixtures in question *were not meant* by the parties to be included in the mortgage deed; and that the words in the deed which would seemingly have embraced them, were satisfied by other fixed property about which no question was made (*d*).

Chap. V. s. 2.

But the *prima facie* inference that all things annexed to the freehold pass by the mortgage deed, is not necessarily rebutted by the fact that the deed contains an enumeration of specific articles. Thus, in *Mather v. Fraser* (*e*) the mortgage deed in question recited that the mortgagors had, as copper roller manufacturers, affixed to the freehold certain articles, including an engine and boiler together with a large quantity of mill gear and millwright work, and then conveyed to the mortgagees the lands, mill, &c., and all and singular the steam engine, steam boilers, mill gear, millwright work and machinery upon the premises, together with (*inter alia*) all fixtures. Page-Wood, V.-C., held that the inference, that everything connected with the working of the mills and attached to the freehold passed by the mere conveyance of the pieces of land and mills, was not rebutted, and that the recital relative to the machinery was evidently inserted not for that purpose, but to show that the mortgagors had brought the factory into complete and active operation. So, in *Haley v. Hammersley* (*f*), there was a mortgage of a silk mill, and also of the steam engines and steam engine boilers, steam pipes, main shafting, mill gearing, millwright's work, and other machinery and fixtures whatsoever in or upon the mortgaged premises. Lord Campbell, C., held that even if

Prima facie
inference not
necessarily
rebutted by
enumeration
of specific
articles.

(*d*) See the remarks in *dell*, L. R., 3 Eq. 249.
Walmsley v. Milne, 6 C. B., (*e*) 2 K. & J. 536.
 N. S. 115; *Cullwick v. Swin-* (*f*) 3 D., F. & J. 587.

Part I.

the enumerated articles were confined to power machinery (as to which he expressed doubt), the subsequent words were comprehensive enough to include all fixed machinery in the mill (*g*).

Intention to be collected from whole of deed.

Where some of the clauses in an instrument are consistent with an intention that the fixtures shall pass, and there are others which are at first sight inconsistent with such an intention, the Court will, of course, look at the whole instrument to see what was the intention of the parties (*h*).

Provisions of Conveyancing Act, 1881.

Although, then, it clearly appears from all these authorities that a mortgage of lands cannot be construed to pass any different rights, with respect to things attached thereto, than other conveyances, yet the decisions referred to may be useful to show the utility of expressing in clear terms in mortgages (as well as in other instruments of conveyance), the intention of the parties with regard to the transfer of property annexed to the freehold (*i*). It is now, however, expressly provided by the Conveyancing and Law of Property Act, 1881 (*k*), that a mortgage unless a contrary intention is expressed, shall operate to convey with the land, all buildings, erections, and fixtures, appertaining thereto.

Fixtures pass, though mortgage only equitable.

Fixtures pass to a mortgagee whether the mortgage be legal or merely equitable, as by a deposit of title deeds accompanied by a memorandum. Thus, in *Ex parte Cowell* (*l*)

(*g*) And see the remarks *ante*, pp. 152, 280.

(*h*) *Thompson v. Pettitt*, 10 Q. B. 101.

(*i*) See Sugden's *Vendors & Purchasers*, p. 33 (14th ed.); and see also *Wheeler v. Montefiore*, 2 Q. B. 133.

(*k*) 44 & 45 Vict. c. 41, ss. 1,

6; *ante*, p. 278.

(*l*) 17 L. J., Bkcy. 16. And see *Ex parte Tagart*, De G. 531; *Ex parte Barclay*, *In re Gawan*, 5 D., M. & G. 403; *Ex parte Astbury*, L. R., 4 Ch. 630; *Longbottom v. Berry*, L. R., 5 Q. B. 123, 136; *Meux v. Jacobs*, L. R., 7 H. L. 481.

it was held that by an equitable mortgage by deposit of leases, together with a memorandum containing no mention of fixtures, the fixtures passed to the mortgagees. And where there was an agreement that the plaintiff should grant B. a lease of certain premises when fitted up by the latter, who was to pay 1,000*l.* as premium, and the plaintiff agreed to lend B. the sum of 1,000*l.* upon the security of the premises "as fitted," the Court of Exchequer Chamber held that the result of the transaction was that the plaintiff became an equitable mortgagee of the premises with the fittings and fixtures which B. had put up (*m*).

It would seem that on principle an equitable mortgage of premises by a simple deposit of the title deeds, unaccompanied by any memorandum, will, in like manner, carry the fixtures. The decision of Sir John Romilly, M. R., in *Williams v. Evans* (*n*), is expressly to that effect; but it is right to add, that a contrary opinion has been entertained. Thus, in *Begbie v. Fenwick* (*o*), Malins, V.-C., said, "With regard to the case of *Ex parte Barclay* (5 D. M. & G. 403), where there was a written memorandum executed by a publican of the lease of his public house with all fixtures, I think there is considerable doubt whether, if it had been a mere deposit of the lease, without any memorandum, the fixtures would have passed." Still more recently in the case of *Ex parte Tweedy* (*p*), Bacon, C. J., said, "It is quite certain that there could be no transfer by deposit of title deeds only of the

And, *semble*,
by mere de-
posit of deeds
without me-
morandum.

See also *Ex parte Price*, 2 M., D. & D. 518; *Ex parte Bentley*, *id.* 591; *Ex parte Heathcoate*, *id.* 711; *Ex parte Edwards*, Fonb. 208.

(*m*) *Tebb v. Hodge*, L. R., 5 C. P. 73.

(*n*) 23 Beav. 239. And see *Russell v. Russell*, 1 Br. Ch. Cas. 269.

(*o*) L. R., 8 Ch. 1075 *in notis*. The decision in this case turned on the question of registration under the Bills of Sale Act, 1854, and it was on this point that it was approved in *Ex parte Daglish*, L. R., 8 Ch. 1072.

(*p*) 5 Ch. D. 559.

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“ fixtures.” As regards the former of these cases, however, it is to be observed that the learned Vice-Chancellor went so far as to doubt whether a conveyance of land without mention of fixtures would be sufficient to pass them, whereas, as we have seen, the authorities are unanimous in holding that in such circumstances the fixtures do pass. And in the latter case it is difficult to see how far the Chief Judge intended actually to decide the point ; as it is evident that there, as in *Begbie v. Fenwick*, the decision really proceeded upon the necessity of registration under the Bills of Sale Act. It is submitted, therefore, that, notwithstanding the opinions expressed in the two last-mentioned cases, the decision in *Williams v. Evans* is correct ; and that, unless there be something to show a contrary intention, an equitable mortgagee by a mere deposit of title deeds is entitled to fixtures, as being a part of the land which constitutes his security.

Fact of
mortgagor
continuing in
possession of
fixtures ;

Several questions have arisen respecting the effect of the mortgagor retaining possession of the fixtures after granting a mortgage of the land to which they are attached. The ground of objection in these cases has been, that as fixtures may be regarded in the nature of personal chattels, the possession of them after a conveyance would, in general, be deemed inconsistent with the deed, and strong proof of fraud (*q*). Agreeably to this view of the subject, Lord Hardwicke, in *Ex parte Quincy* (*r*), thought that there would have been a difficulty on account of the mortgagor's possession, if it had not appeared that there was an express agreement between the parties that he should have a right

(*q*) See the statute 13 Eliz. c. 5 ; *Twyne's case* (3 Co. 80), 1 Sm. L. C. 1, and notes thereto ; *Edwards v. Harben*, 2 T. R. 587 ; *Reed v. Blades*, 5 Taunt. 212 ; *Bryson v. Wylie*, 1 Bos. & Pul. 83, in *notis* ; *Eastwood v. Brown*,

1 Ry. & M. 312. The fact that there is no change of possession of chattels is only evidence that the transfer is colourable. *Martindale v. Booth*, 3 B. & Ad. 498.

(*r*) 1 Atk. 477.

of entering upon the mortgaged premises. It is, however, Chap. V. s. 2. now clearly established, that things affixed to the land partake so much of the nature of realty, that the retaining possession of them together with the land after an assignment will not avoid the conveyance on the ground of fraud. In this respect, therefore, a mortgage of property in a state of annexation, differs from a mortgage of things severed from the freehold, or of mere personal chattels transferable from hand to hand.

This subject will be found more fully discussed in the cases referred to in the next section. It will be sufficient in this place, to cite the two following authorities, in which the rule is very clearly laid down. In the case of *Ryall v. Rolle* (s), a brewer having borrowed money, as a security conveyed and assigned his dwelling-house and brewhouse, and all the coppers and utensils of trade belonging thereto, by way of mortgage, subject to redemption; and afterwards continued in possession. On a question between the first mortgagee and the subsequent mortgagees and creditors, as to the validity of the first mortgage, which was disputed on the ground of fraudulent possession by the debtor, the Court were clearly of opinion, that the first mortgage was not invalidated on this account, nor was the mortgagee deprived of his lien upon the fixed utensils. The Court said, moreover, that neither the mortgagor nor any other person had a right to remove the fixtures until the mortgage was satisfied.

Does not
avoid mort-
gage on
ground of
fraud.

In like manner, in the case of *Steward v. Lombe* (t), a person having mortgaged a windmill of a peculiar construction, continued in possession of it after the mortgage; and it was holden that the possession was not fraudulent. And the Court observed, that it was not to be expected

(s) 1 Atk. 165.

(t) 1 Brod. & Bing. 506.

Fisher on Mortg. (3rd ed.), pp. 28, 238; Coote on Mortg. (4th ed.), p. 452.
See Powell on Mortg. 36, a;

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Result same
whether pro-
perty freehold
or leasehold.

that the mortgagee should come to reside in the mill. The mortgagee, in conformity with the usual practice in such cases, permitted the mortgagor to continue in possession, and constructive possession of the land under the deed was a sufficient possession of the mill standing on the land; and the more so, as this was not an absolute conveyance, but a mere pledge to be kept till money lent on the security of it was repaid. If the party relinquished possession, it would probably defeat all the ends of the mortgage. The mortgagee could only have taken possession by entering the land unnecessarily, or by occupying the mill to his own personal inconvenience (*u*). In this case it may be observed that the mill had been erected by the owner of the fee, and was not seizable under a writ of *fiери facias* against him; and the Court (*v*) appear in some measure to have relied upon this circumstance. This distinction has been insisted on in some other cases also. But it is clear that the principle of the decision holds equally in the case of the mortgage of a mere chattel interest; as where a *tenant* having erected fixtures during the term afterwards mortgages his interest in the premises (*x*). The circumstance of the fixed property being in the latter case seizable in the hands of the tenant under a *fiери facias*, cannot make it so far a personal chattel, that the mortgagor's retaining possession of it together with the land would be deemed fraudulent.

Mortgagor
cannot remove
fixtures pend-
ing the mort-
gage;

It follows from the principles laid down in the preceding pages, and from the relation in which the mortgagor stands to the mortgagee, that although the mortgagor may continue in possession of the estate and of the fixtures after

(*u*) See also *Hubbard v. Bagshaw*, 4 Sim. 326, decided on the authority of the above cases; *Fletcher v. Manning*, 1 C. & K. 350.

(*v*) See *per* Richardson, J., 1 Brod. & Bing. at p. 513.

(*x*) *Accord. per* Parke and Alderson, B.B., in *Minshall v. Lloyd*, 2 M. & W. at p. 459 *et seq.*; and *per* Alderson, B., in *Boydell v. M. Michael*, 1 Cr. M. & R. at p. 180.

the mortgage, he is not at liberty to disannex and remove any of the fixtures from off the premises (y). The case of *Hitchman v. Walton* (z) is also an authority upon this point. It was there holden that where a lessee for years had mortgaged all his interest in the premises, and became bankrupt, the mortgagee might sue the assignees who had taken down and removed the fixtures from off the premises; and might declare in case as reversioner: and moreover, that he could recover in trover against them for the value of the fixtures, whether they were on the premises before the lease, or were afterwards erected by the mortgagor; and whether they belonged to the lessor at the end of the term or not.

Chap. V. s. 2.

Neither can a mortgagor by any voluntary act deprive the mortgagee of his rights in respect of the fixtures. Thus, in *The London and Westminster Loan, &c. Co. v. Drake* (a) the question was whether, if a lessee mortgaged tenant's fixtures and afterwards surrendered his lease, the mortgagee had a right to enter and sever them. The Court of Common Pleas held that the mortgagee's interest was so far connected with the land that it might be considered a right or interest in it, and that the tenant should not be allowed to defeat his grant by a subsequent voluntary act of surrender. The Court decided, therefore, that the mortgagees might maintain an action against the incoming tenant, for preventing them from exercising their right to sever, and might in such action recover the value of the fixtures as severed.

Nor deprive mortgagee of his rights by voluntary act.

At the present day it is very usual to insert in mortgage deeds a clause by which the mortgagor attorns tenant to

Effect of attornment clause in mortgage.

(y) See *per* Wood, V.-C., in *Boyd v. Shorrocks*, L. R., 5 Eq. at p. 78.

(z) 4 M. & W. 409. And see *Ex parte Reynal*, 2 M., D. & D. at p. 450, and the cases

there referred to.

(a) 6 C. B., N. S. 798. Compare *Moss v. James*, 47 L. J., Q. B. D. 160, affirmed in Court of Appeal, 38 L. T. 595.

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the mortgagee at a rent equal to the interest on the mortgage debt. In the case of *Ex parte Punnett, In re Kitchen* (b), it was ingeniously argued that in such a case the mortgagor was to be treated as tenant, and the mortgagees as landlords and nothing more; and that the trustee in bankruptcy of the former was, therefore, entitled to trade fixtures annexed after the date of the mortgage. The Court of Appeal, however, held that the attornment clause was merely an additional security, and that the mortgagee retained the same rights in regard to the fixtures, as if no such clause had been inserted, and consequently that all the fixtures were comprised in the security.

Bills of Sale.

Although, as we have seen above, a mortgage of land and fixtures does not fall within the provisions of the statute as to fraudulent conveyances, by reason only that the mortgagor remains in possession of the fixtures, yet the Acts regulating bills of sale have from time to time prescribed that certain formalities shall be observed in such cases, with a view to the avoidance of the evils resulting from the credit obtained by the mortgagor, in consequence of his possession and apparent ownership of the fixtures after the mortgage.

The Acts at present in force on the subject are the Bills of Sale Acts, 1878 and 1882 (c). The effect of the former Act as regards the sale of fixtures was considered in the last section, and the remarks which were there made as to the circumstances in which registration is necessary are equally applicable to cases of mortgage. The Act of 1882 leaves untouched the provisions of the former Act upon this point, and, therefore, for information as to what documents are bills of sale within the Acts and require registration, the reader is referred to the remarks in that section (d).

(b) 16 Ch. D. 226.

45 & 46 Vict. c. 43.

(c) 41 & 42 Vict. c. 31, and

(d) *Ante*, p. 281 *et seq.*

The Act of 1882 came into operation on the 1st of November in that year (*e*), and sect. 3 provides that the Act shall, so far as is consistent with the tenor thereof, be construed as one with the Act of 1878, but that unless the context otherwise requires, it shall not apply to any bill of sale duly registered before its commencement, so long as the registration thereof is not avoided by non-renewal or otherwise (*f*). By the same section the expression "bill of sale," and other expressions in the Act, are to have the same meaning as in the Act of 1878, except as to bills of sale or other documents mentioned in sect. 4 of that Act (*g*), which may be given otherwise than by way of security for the payment of money, to which last-mentioned bills of sale and other documents the Act of 1882 does not apply. This Act is not intended, therefore, to be a code regulating all bills of sale, inasmuch as all absolute bills of sale are excepted from its operation; and the result seems to be that the latter are, therefore, regulated entirely by the Act of 1878, whilst the amendments introduced by the Act of 1882 apply only to bills of sale given by way of mortgage or security (*h*).

Chap. V. s. 2.

Provisions of
Bills of Sale
Act, 1882.

Act does not
apply to all
bills of sale.

Every bill of sale made by way of security for the payment of money, upon or after the 1st of November, 1882, is absolutely void, if made in consideration of any sum under 30%, or if it is not in accordance with the form given in the Act (*i*). Such bills of sale must now have a schedule containing an inventory, in which the fixtures

Bills of sale to
be in statutory
form, and to
have schedule.

(*e*) Sect. 2. The Act does not extend to Scotland or Ireland (sect. 18).

(*f*) See *Ex parte Izard, Re Chapple*, 23 Ch. D. 409.

(*g*) *Ante*, p. 282.

(*h*) *Swift v. Pannell*, 48 L. T. 351; *Ex parte Izard, supra*, per Fry, L. J., at p. 413.

(*i*) Sects. 9, 12. That is to say, *substantially* in accord-

ance with the form. *Davis v. Burton*, 11 Q. B. D. at p. 540, per Brett, M. R.; and see *Wilson v. Kirkwood*, 48 L. T. 821. In the former case it was held that a bill of sale was void, as evading the provisions of section 7, which specifies the events in which alone the property can be seized.

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assigned are specifically described, otherwise in respect of fixtures not so described they will (with the exceptions hereafter mentioned) be void, "except as against the grantor" (*l*). It is evident that a bill of sale made in the form given by the Act, but having no schedule, would be void for uncertainty, inasmuch as the statutory form refers to the schedule for a description of the articles assigned. Moreover, although the schedule may contain the requisite description, a bill of sale will (with the exceptions hereafter mentioned) be void, except as against the grantor, in respect of things of which he was not the true owner (*m*) at the time of the execution of the bill of sale (*n*).

Growing crops
and substituted
fixtures.

The exceptions to the provisions of the last two sections are contained in sect. 6, which provides that nothing contained in these sections shall render a bill of sale void in respect of any of the following things, (that is to say)—

- (1.) Any growing crops separately assigned or charged, where such crops were actually growing at the time when the bill of sale was executed (*o*).
- (2.) Any fixtures separately assigned or charged, and any plant or trade machinery, where such fixtures, plant or trade machinery are used in, attached

(*l*) Sect. 4. The difficulty of construing the words "except as against the grantor," is well pointed out by Mr. Prideaux in his valuable notes on the Act (1 Prideaux Prec., p. 718, 12th ed.), where he says:—"It is assumed that they cannot be taken literally, as meaning that an instrument good against the grantor himself, is to be void against *all* persons claiming under him," and expresses an opinion that a distinction must be

made between assigns by deed, and assigns by act of law.

(*m*) For the purposes of this Act, a tenant must be considered the owner of tenants' fixtures, although, as we have seen, strictly speaking, the property in the fixtures, until severed, is in the landlord. *Ante*, Chap. I., p. 31.

(*n*) Sect. 5.

(*o*) As to growing crops, see *ante*, p. 283.

to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for any of the like fixtures, plant or trade machinery specifically described in the schedule to such bill of sale. Chap. V. s. 2.

The result of these provisions is that, except in the case of growing crops and substituted fixtures, plant or trade machinery, a mortgage by bill of sale of after-acquired property is void, "except as against the grantor."

Bills of sale of after-acquired property.

The Act provides that bills of sale given by way of security for the payment of money are to be registered under the Act of 1878, but it also contains fresh provisions as to attestation, registration and inspection, and amends and repeals some of the provisions of that Act in these respects (*p*). By sect. 8, if the consideration for which a bill of sale is given is not truly set forth, or if the bill of sale be not duly attested or registered, it will be absolutely void (*q*).

Attestation and registration of bills of sale for security of money.

Sect. 15, by repealing sect. 20 of the Act of 1878, deprives holders of bills of sale of chattels to which this Act applies, of the security which that section gave them in the event of the bankruptcy of the grantor (*r*). But this does not affect the right of the grantee of *fixtures* in such a case, for, as will be seen in the next section (*s*), the provisions of the Bankruptcy Act on this subject are not applicable to fixtures. The grantee of fixtures under a duly registered bill of sale is therefore entitled to them, although the grantor becomes bankrupt, and they remain in his possession at the commencement of the bankruptcy.

Fixtures in possession of grantor upon his bankruptcy.

(*p*) Sects. 8, 10, 11, 16.

(*q*) Under the Act of 1878, the bill of sale is void only as against the grantor, see *ante*, p. 287.

(*r*) But such repeal does not affect bills of sale operating by way of absolute transfer, see *ante*, p. 288.

(*s*) *Post*, p. 309 *et seq.*

SECTION III.

*Of the Transfer of Fixtures in the case of Bankruptcy.*Part I.

THE earlier Bankruptcy Acts (*t*) and the more recent enactment of 1869 (*u*) have given rise to some questions respecting fixtures, which depend upon the peculiar nature of this species of property. Perhaps the points most frequently before the Courts have arisen on the bankruptcy of the mortgagors of premises and fixtures, who have remained in possession of the property after the mortgage. And the question has been whether the trustee in bankruptcy is entitled to claim the fixtures as part of the goods and chattels of the bankrupt, or as being in his reputed ownership at the time of the bankruptcy; or whether the mortgagee can legally claim them as part and parcel of the mortgaged estate.

Right of trustee to property of which bankrupt reputed owner.

By sect. 44 of the Bankruptcy Act, 1883 (*x*), which comes into operation on the 1st day of January, 1884 (*y*), it is provided that the property of the bankrupt divisible amongst his creditors shall comprise, *inter alia*—

“All goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section.”

(*t*) 21 Jac. 1, c. 19; 6 Geo. 4,
c. 16; 12 & 13 Vict. c. 106.
(*u*) 32 & 33 Vict. c. 71.

(*x*) 46 & 47 Vict. c. 52.
(*y*) Sect. 3.

The provisions of this section being very similar to those contained in the earlier Acts, the decisions under such Acts may be usefully referred to in considering the construction to be placed upon this section. Chap. V. s. 3.

In pursuing this inquiry, it will be proper to notice in the first place the case of *Horn v. Baker* (z), the particulars of which will be found in a former page (a). The question arose there, under the statute of 21 Jac. I. c. 19, by which the subject was then governed. Certain stills fixed to the freehold had been leased together with a distillery for a term; the lessee became bankrupt; and it was held that the stills did not pass to the assignees under the description of goods and chattels within the meaning of the statute. And the Court drew a distinction between these articles and certain other utensils which were not fixed, but merely stood upon frames or horses; and the latter they held would pass to the assignees under the words of the statute (b). This case and that of *Ryall v. Rolle* (c), which has also been already noticed, may be considered as the leading

Fixed articles
not goods
and chattels
within the
Bankruptcy
Acts.

(z) 9 East, 215.

(a) *Ante*, p. 4.

(b) With respect to the moveable utensils in this case, there was nothing to rebut the reputed ownership of the bankrupt as to them; but the Court considered that they would not have passed to the assignees had there been a known usage of trade of leasing such things together with the premises; for then the use and possession of them would not have carried the reputed ownership. And it is now well established that if there be a known common usage for the hire of chattels, it will negative the rule in bankruptcy as to reputed

ownership. See *Storer v. Hunter*, 3 B. & C. 368; *Ex parte Powell*, 1 Ch. D. 501; *Ex parte Hattersley*, 8 Ch. D. 601; *Crawcour v. Salter*, 18 Ch. D. 30. And see *Shuttleworth v. Hernaman*, 1 De G. & J. 322, 325; *Ex parte Wingfield*, 10 Ch. D. 591; and *post*, p. 318. Compare *Ex parte Brooks*, 23 Ch. D. 261. As to custom generally, see *ante*, p. 67. As to trading articles not fixed passing to the assignees, see *Bryson v. Wylie*, 1 Bos. & Pul. 83 *in notis*; *Ex parte Dale*, Buck, 365; *Lingard v. Messiter*, 1 B. & C. 308; *Shuttleworth v. Hernaman*, *supra*.

(c) 1 Atk. 165, *ante*, p. 301.

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decisions upon this subject : and the principle to be deduced from them, viz. that fixtures constitute part of the freehold, and are not to be taken as goods and chattels within the meaning of the Bankruptcy Acts, has been recognized and affirmed by a series of very important decisions of more modern date.

*Clerk v.
Crownshaw.*

Thus, in the case of *Clerk v. Crownshaw*, in the Court of King's Bench (*d*), a tenant took a lease of a mill and iron forge, and bought the fixed and moveable implements therein; but it was agreed that they should be delivered up at the determination of the term at a valuation, if the lessors gave notice of their desire to have them. The tenant afterwards assigned the premises and machinery by way of mortgage, but continued in possession of them, and became bankrupt. It was held that this case fell within the principle of *Horn v. Baker*, and was governed by it; and a like distinction was taken, as in that case, between the fixed and the moveable property in the mill. Again, in another case which followed soon afterwards in the same Court, a similar question arose. In *Coombs v. Beaumont* (*e*), a steam engine, &c., fixed up in a colliery, was leased to a tenant to be used by him during the term, but to be held as the property of the landlord. It was ruled, on the authority of *Horn v. Baker*, that these articles did not come under the description of "goods and chattels," and did not pass as such to the assignees under a commission of bankruptcy against the tenant (*f*).

*Coombs v.
Beaumont.*

*Ex parte Barclay,
In re Gowan.*

The point under consideration may be considered to have been finally settled in 1855, by the case of *Ex parte*

(*d*) 3 B. & Ad. 804.

(*e*) 5 B. & Ad. 72.

(*f*) See also *Boydell v. M'Michael*, 1 Cr. M. & R. 177; *Hallen v. Runder*, *id.* 266; *Minshall v. Lloyd*, 2 M. & W. at p. 459, per Parke, B.; *Hitchman v. Walton*, 4

M. & W. at p. 414, per Lord Abinger, C. B.; *Freshney v. Carrick*, 1 H. & N. at p. 658, per Pollock, C. B.; *In re M'Kibbin*, 4 Ir. Ch. R. 520; *Ex parte Willoughby D'Eresby*, 29 W. R. 527.

Barclay, in re Gawan (g). There the bankrupt, who was the occupier of a public house and had a leasehold interest in that and four other houses, mortgaged them to the petitioner. The mortgage comprised the trade and domestic fixtures on the mortgaged premises (h). The assignees under the bankruptcy claimed the fixtures under sect. 125 of the Bankruptcy Act, 1849, as being in the order and disposition of the bankrupt as reputed owner at the time of the bankruptcy. Lord Cranworth, C., in delivering the judgment of the Court of Appeal in Chancery, said that the statute, it was admitted, did not apply to a house, and a creditor was bound to take notice that a house might be mortgaged, and therefore if it was mortgaged, the presumption was that all was mortgaged which would pass under a conveyance of the house. It was held accordingly that the subsequent possession of the fixtures by the bankrupt was not a possession of them as goods and chattels, but as part of the houses to which they were annexed, and that the fixtures were not goods and chattels within the meaning of the statute. His Lordship said that the Court would have arrived at the same conclusion had the matter been *res integra*, but that for nearly half a century the matter had been considered as perfectly settled.

Chap. V. s. 3.

Prior to the last-mentioned case there was a decision upon this subject in the Court of Exchequer, which at one time gave rise to much discussion, and in which the doctrine as laid down in the above cases appears, at first sight, not to have been altogether adopted by the Court. This is the case of *Trappes v. Harter* (i), where the owners in fee of certain calico print works mortgaged the same, and having

Decision in
Trappes v.
Harter con-
sidered.

(g) 5 D. M. & G. 403. See too *Mather v. Fraser*, 2 K. & J. 536; *Tebb v. Hodge*, L. R., 5 C. P. 73.

(h) *Ante*, p. 293.

(i) 2 Cr. & M. 153. The facts of the case are very special and complicated; they may be sufficiently gathered from the judgment at p. 180 of the report.

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continued in possession afterwards became bankrupt. It was held that certain fixed trade machinery upon the premises did not belong to the inheritance, but was part of the personal estate of the bankrupts, and as such was declared to pass to the assignees.

Conceding to this case its full effect as a valid authority, it must be regarded as having been decided entirely upon its own peculiar circumstances; and especially with reference to the intent of the parties to the mortgage deed. And although the *dicta* of Lord Lyndhurst, C. B., who delivered the judgment of the Court, certainly seem to favour the proposition that trade fixtures erected in the circumstances mentioned, are to be looked upon as personal chattels, yet the general question as to fixtures being goods and chattels within the Bankruptcy Acts, is not really touched by the case. For the Court having decided that the machinery in question was not included in the mortgage, it necessarily passed to the assignees with the bankrupts' estate, not under the order and disposition clause, but because it remained the property of the bankrupts. The decision, therefore, cannot be regarded as impugning the doctrine which has been so clearly established by the above-mentioned authorities (k).

Fixtures
though dealt
with sepa-

It follows from the above doctrine, founded upon the nature of fixtures as being a part of the realty, that so long

(k) This accords with the explanation of this decision given in the following cases:—*Ex parte Barclay, In re Gawan*, 5 D. M. & G. 403; *Walmsley v. Milne*, 7 C. B. N. S. 115, 133; *Whitmore v. Empson*, 23 Beav. 313, 318; *Culwick v. Scindell*, L. R., 3 Eq. 249, 253. In *Ex parte Tweedy* (5 Ch. D. at p. 566), Bacon. C. J., is represented to

have used expressions which certainly seem to show that that learned judge thought that fixtures comprised in a mortgage of realty fell within the order and disposition clause of the Bankruptcy Act, 1869. But those expressions formed no part of the actual decision, and, it is submitted with deference, must be looked upon as extra judicial.

as they remain unsevered, they do not become goods and chattels within the Bankruptcy Act, although they are dealt with separately from the land to which they are annexed. The fact, therefore, that a bankrupt has mortgaged the realty to one person, and the fixtures separately to another, does not effect a constructive severance, so as to make them goods and chattels in the order and disposition of the bankrupt in whose possession they may be at the time of the bankruptcy (*l*). In such a case, however, as has been seen in the preceding section, the transaction would fall within the provisions of the Bills of Sale Acts, 1878 and 1882, and registration under those Acts would be necessary (*m*).

Chap. V. s. 3.

rately, not
chattels
within Act.

From the principles laid down in the foregoing decisions, it may be inferred that where a tenant for years becomes a bankrupt, the articles and utensils which he has himself attached to the demised premises, and which are removable by him at the end of his term, will not pass absolutely to his trustee in bankruptcy like the bankrupt's goods and chattels, or those in his possession or disposition (*n*). There is no doubt, however, that the trustee may lay claim to them on the ground of his succeeding to the bankrupt's interest in the term (*o*).

Right of
trustee to
tenant's fix-
tures.

(*l*) *Whitmore v. Empson*, 23 Beav. 313.

(*m*) *Ante*, pp. 285, 304.

(*n*) Fixtures erected by the tenant himself are, *in favour of creditors*, so far considered as goods and chattels, that they are seizable under a *fi. fa.*, which contains only the words "goods and chattels." See *post*, p. 393.

(*o*) *Ex parte Barclay, In re Gawan*, 5 D. M. & G. 403, 411; *Gibson v. Hammersmith*

Rail. Co., 32 L. J., Ch. 337, 341. And see 46 & 47 Vict. c. 52, s. 44, which provides that the property divisible amongst the creditors of the bankrupt shall comprise (*inter alia*), the capacity to exercise powers in respect of property, which might have been exercised by the bankrupt for his own benefit. As to the time within which the right of severance is to be exercised, see *ante*, pp. 140, 162.

Part I.

Effect of disclaimer by trustee under Bankruptcy Act, 1869.

Under the Bankruptcy Act, 1869 (*p*), however, it was decided (in accordance with the view expressed in the former edition of this work), that if the trustee in bankruptcy of a lessee disclaimed the lease under sect. 23 of that Act, he could not afterwards exercise the right which he would otherwise have had to sever the fixtures. That section provided that in case of such disclaimer, the lease should be deemed to have been surrendered from the date of the order of adjudication, and it was held that the effect of this provision was to place the trustee in the position of never having had any estate at all (*q*). It followed logically, therefore, from this decision, that although the trustee had actually sold or severed the fixtures before the execution of the disclaimer he was in no better position, and in case of sale he was liable to pay over the proceeds to the lessor (*r*). And in one case (*s*) *Amphlett, B.*, seems, adopting a suggestion in the last edition of this work (*t*), to have doubted whether a severance of fixtures would not have been inconsistent with the exercise of the right of disclaimer, in so much that the trustee could not disclaim the lease after a sale of the fixtures. In short, the disclaimer by the trustee put an end, not merely to the term, but to the lease itself, and consequently neither party could claim the benefit of its provisions. On the one hand it deprived the landlord of the future benefit of all those clauses of the lease which gave him a benefit, and on the other hand it deprived the tenant of the future benefit of all those clauses which gave him a benefit (*u*).

(*p*) 32 & 33 Vict. c. 71.

(*q*) *Ex parte Stephens, In re Lavies*, 7 Ch. D. 127.

(*r*) *Ex parte Brook, In re Roberts*, 10 Ch. D. 100.

(*s*) *Saint v. Pilley*, L. R., 10 Ex. at p. 141. See, too, *Ex parte Brook*, 10 Ch. D. at p. 110.

(*t*) Page 239 (2nd ed.).

(*u*) *Ex parte Glegg, In re Latham*, 19 Ch. D. 7; *Ex parte Allen, In re Fussell*, 20 Ch. D. 341; *Ex parte Hart-Dyke, In re Morrish*, 22 Ch. D. 410. And see *Kearsey v. Carstairs*, 2 B. & Ad. 716; *Fairburn v. Eastwood*, 6 M. & W. 679; *Lowrey v. Barker*, 5 Ex. D. 170.

The construction placed upon the above-mentioned section was considered to be unduly prejudicial to the rights of creditors, and an alteration has accordingly been effected by sect. 55 of the Bankruptcy Act, 1883 (*x*). The first clause of this section confers upon the trustee substantially the same right of disclaimer which he enjoyed under the Bankruptcy Act, 1869, with the exception that such right must in general be exercised within three months after the first appointment of a trustee. The same section contains the following provisions:—

Chap. V. s. 3.

Disclaimer by trustee under Bankruptcy Act, 1883.

“(2) The disclaimer shall operate to determine, *as from*
 “*the date of disclaimer*, the rights, interests, and
 “liabilities of the bankrupt and his property in
 “or in respect of the property disclaimed, and
 “shall also discharge the trustee from all personal
 “liability in respect of the property disclaimed
 “as from the date when the property vested in
 “him, but shall not, except so far as is necessary
 “for the purpose of releasing the bankrupt and
 “his property and the trustee from liability,
 “affect the rights or liabilities of any other
 “person.”

“(3) A trustee shall not be entitled to disclaim a lease
 “without the leave of the Court (*y*), except in
 “any cases which may be prescribed by general
 “rules, and the Court may, before or on granting
 “such leave, require such notices to be given to
 “persons interested, and impose such terms as a
 “condition of granting leave, and *make such*
 “*orders with respect to fixtures, tenant's improve-*
 “*ments, and other matters arising out of the*
 “*tenancy as the Court thinks just.*”

Under the above provisions it is clear that the trustee Trustee may now both

(*x*) 46 & 47 Vict. c. 52.

Rule 28 of the Bankruptcy

(*y*) The leave of the Court

Rules, 1871.

was formerly required by

Part I.

sever and
disclaim.

will be entitled to sever the tenant's fixtures, and subsequently to disclaim the lease, and this even in the absence of any direction as to such fixtures in the order giving him leave to disclaim. No doubt can, therefore, in future arise as to the validity of a disclaimer, on the ground of a previous severance of the fixtures by the trustee, because the recent Act has abolished the retrospective operation of such disclaimer, and the severance will accordingly take place during the term.

Disclaimer
does not affect
rights of third
parties.

It was decided, under the Bankruptcy Act, 1869, that a disclaimer of the bankrupt's interest in leasehold property operated only for the relief of the bankrupt and his estate, and that it did not interfere with the rights of third parties, having, in this respect, the same effect as a surrender by the bankrupt himself. Thus, it did not destroy the interest of an underlessee (z). It will be seen that the present Act (a) expressly provides that the disclaimer shall not, except as therein mentioned, affect the rights or liabilities of any other person. In *Ex parte Walton* (b), however, it was decided that where a bankrupt had made an underlease of the premises, a disclaimer did not affect the right of the lessor to distrain upon the property for the rent reserved by the original lease, or to re-enter for the breach of the covenants contained in it. Upon this point also the present Act contains express provisions, for clause 6 of the above-mentioned section enacts that the Court may, *on application* by any person claiming any interest in any disclaimed property, make an order for the vesting of the property in any person entitled thereto; provided that the Court shall not make a vesting order in favour of any person claiming under a bankrupt, either as underlessee or

*Ex parte
Walton.*

Court may
make vesting
order.

(z) See *Smalley v. Harding*, 7 Q. B. D. 524; *Ex parte Walton*, 17 Ch. D. 746. See also *East & West India Dock Co. v. Hill*, 22 Ch. D. 14; *Harding v. Preece*, 9 Q. B. D. 281; and *ante*, p. 140.
(a) Sect. 55 (2), *supra*.
(b) *Supra*.

as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease at the date when the bankruptcy petition was filed, and that any mortgagee or underlessee *declining to accept* a vesting order upon such terms shall be excluded from all interest in and security upon the property. It should be noticed that the application for a vesting order being, as it seems, optional, the jurisdiction of the Court to exclude an underlessee from any interest in the property does not arise in the absence of any such application; and this being so, the respective rights of a lessor and an underlessee will, in such circumstances, still be governed by the decision in *Ex parte Walton*, viz., that the underlessee takes the property subject to all the lessor's rights *in rem*.

Independently of the construction put upon the words "goods and chattels" in the statutes, as laid down in the cases already noticed, it has been established that property affixed to the freehold is not within the intent of the statutes, because the possession of such property does not create a visible ownership in the bankrupt so as to procure him unmerited credit. For creditors are not deceived by the possession of property of this description; and it differs from the case of personal goods, where the possession and power of disposal are the only evidence of ownership to which a creditor can look. This proposition forms, indeed, in part, the ground of decision in several of the cases which have been already referred to. And the rule resulting from it, that the doctrine of reputed ownership does not attach to property affixed to the freehold, has been established by a series of decisions both at law and equity (c).

Possession of fixtures not a reputed ownership.

(c) See *Steward v. Lombe*, 1 Brod. & Bing. at p. 511; *Rufford v. Bishop*, 5 Russ. 346; *Hubbard v. Bagshaw*, 4 Sim. 326; *Boydell v. M'Michael*, 1

Cr. M. & R. at p. 179. And see *Ex parte Smith, In re Bakewell*, Buck, at p. 152 *et seq. in notis*. In *Sinclair v. Stevenson* (2 Bing. 514), the

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Thus in *Ex parte Barclay, In re Gauan* (*d*), Lord Cranworth, C., in giving the judgment of the Court, said that the object of the similar provision in the Bankruptcy Act, 1849 (*e*), was to prevent fictitious credit by an appearance of wealth, and that it was scarcely possible to suppose that credit was ever really given upon the faith of fixtures as distinguished from a house.

Effect of
usage.

Prior to the foregoing decisions, a case of a similar description had occurred in the Court of King's Bench; but the determination was there made to rest on less general grounds. In the case of *Storer v. Hunter* (*f*), it was held that the possession by a tenant of certain fixed machinery which he had taken on lease together with some collieries, and of new machinery which he had erected to replace some of the old, was not to be considered a reputed ownership within the meaning of the statutes of bankruptcy; either during the term, or, after he had forfeited it, between a judgment in ejectment by his landlord and the execution of the writ of *habere facias possessionem*. But in this case the Court relied principally on an usage which was proved, of demising the machinery with the collieries, the landlord retaining the right to it on the determination of the tenant's lease; for it was said, that this usage rebutted the presumption of a reputed ownership arising from the possession of the articles (*g*).

assignees of a bankrupt were held entitled to certain implements and fixtures on the ground of reputed ownership. But that decision rested on the fact of fraud between the parties, in making a pretended lease of the premises and fixtures to the bankrupt; and the principle established in *Horn v. Baker, &c.*, was not adverted to.

(*d*) 5 D. M. & G. at p. 411. See also *In re M'Kibbin*, 4 Ir. Ch. R. 520.

(*e*) 12 & 13 Vict. c. 106, s. 125.

(*f*) 3 B. & C. 368.

(*g*) See per Parke, J., in argument in *Coombs v. Beaumont*, 5 B. & Ad. at p. 76; see also *Rufford v. Bishop*, 5 Russ. 346; *Trappes v. Harter*, 2 Cr. & M. 153; *Hubbard v.*

Of this case it may be remarked, that in some of the other decisions on the subject, the prevalence of a custom in the neighbourhood of demising fixtures together with the premises, or of selling them without reference to the freehold, has been adverted to by the judges as an ingredient in their determinations. It has been seen, however, that the rule which establishes that the doctrine of reputed ownership is not applicable to things fixed to the freehold, is founded on a more general principle, depending on the nature and character of the property itself. It is apprehended, therefore, that in this case of *Storer v. Hunter*, the claim of the assignees could not have been supported in any point of view; for according to the general rule the possession of the fixed articles would not have created a reputed ownership, even if there had been no usage in the case; and from the decision of *Horn v. Baker* and the other cases, it follows, that notwithstanding the bankrupt retained the visible ownership of the machinery, it would not have passed to the assignees under the words of the statute; and lastly, the assignees could not have taken the fixed property as part of the bankrupt's estate and effects, because it appears from the statement of the case, that before the act of bankruptcy the lease had been forfeited, and the term was at an end (*h*).

Chap. V. s. 3.

Remarks
upon decision
in *Storer v.*
Hunter.

One further case may here be noticed. A., having contracted to purchase a factory with a steam engine and fixtures, took possession on part payment of the price; he never himself assumed the actual occupation, nor worked

Machinery in
possession of
bankrupt
purchaser of
factory.

Bagshaw, 4 Sim. 326; *Ex parte Scarth*, 1 M. D. & D. 240; and *ante*, p. 309, note (*b*).

(*h*) See the explanation of this case given by Taunton, J., in *Clerk v. Crownshaw*, 3 B. & Ad. at p. 808; *Fairburn v. Eastwood*, 6 M. & W. at pp. 682, 683. The case was

tried a second time at the Derby Spring Assizes, 1826, and a verdict was found against the assignees. It was brought down for trial a third time at the following Summer Assizes, but was compromised.

Part I.

the machinery, but retained the man who before had the charge of it under the vendor in the same employment. The remainder of the purchase-money not being paid, A. requested the vendor to re-sell and pay himself; and accordingly the latter immediately took possession of the property, and engaged the man in charge still to continue so on his behalf. On the following day A. became bankrupt. It was held that in these circumstances the steam engines and fixtures were not in the reputed ownership of the bankrupt at the time of his bankruptcy (i).

No distinction
between
tenant's fix-
tures and
those put up
by freeholder.

In the application of the rule as laid down in the preceding pages, a distinction was insisted upon in some of the earlier cases, between fixtures which are put up by a tenant, and those annexed by the owner of the freehold to his own estate; and it was contended that the former partake so much of the nature of personalty that they ought to be considered goods and chattels within the meaning of the order and disposition clauses in the then Bankruptcy Acts. This doctrine was admitted by some of the judges in the Courts of Bankruptcy; at least in respect of trade fixtures erected by a tenant, which might be removed without damage to the freehold (j). But on considering the true nature of fixtures of whatever description, and that for whatever purpose they may have been erected, they all alike change their character by annexation, and participate in that of the freehold, it is impossible to reconcile the former practice in bankruptcy as found in some of those cases, with the general rule as it was finally declared in

(i) *Ex parte Watkins*, 1 Dea. 296. This case was decided without regard to the question, whether the property in dispute was to be regarded as personalty.

(j) See *Ex parte Lloyd*, 1 Mont. & Ayr. 494, 506; *Ex*

parte Wilson, 2 *id.* 61, 70; *Ex parte Belcher*, *id.* 160, 167; *Ex parte King*, 1 M. D. & D. 119, where the Court were divided in opinion; and *Ex parte Austin*, 1 Dea. & Ch. 207, in which case, however, no judgment was given.

Ex parte Barclay, In re Gawan (*j*). It is clear, therefore, Chap. V. s. 3. at the present day that no such distinction exists (*k*).

(*j*) *Ante*, p. 310. And see *Mather v. Fraser*, 2 K. & J. at p. 555.

(*k*) For further authorities on the doctrine of order and disposition as applied to the case of fixtures, the reader

may refer to the following cases:—*Ex parte Broadwood*, 1 M. D. & D. 631; *Ex parte Scarth*, *id.* 240; *Ex parte Spicer*, 2 Dea. 335; and *Ex parte Reynal*, 2 M. D. & D. 443, where the cases are examined.

SECTION 4.

Of the Transfer of Fixtures by Devise.

Part I.

Annexations
to the free-
hold, in what
cases de-
visable.

WITH respect to the transfer of fixtures by devise, it may be observed, that where a testator has a devisable interest in a house, &c., he may devise the incidents of the house, and things that are annexed to the house, either together with, or in separation from the freehold. On the other hand, if the estate itself is not devisable, the things which are annexed to it are not in general devisable; and, therefore, a tenant for life or in tail cannot devise the doors, windows, or wainscot of a house, nor personal chattels that are affixed to the house, and which form part of it; but such a devise is void (*l*). But even in this case, the testator may devise away such fixtures as are severable from the freehold, and which would go to his personal representative; because these are not incident to the inheritance.

Annexations
belong to de-
visee of the
land.

In general it may be considered as a rule, that the devisee of land will be entitled to all articles which are affixed to the land, whether the annexation takes place prior or subsequent to the date of the devise, according to the legal maxim "*quod ædificatur in arêâ legatâ cedit legato*" (*m*). By a devise, therefore, of a house, all personal chattels which are annexed to the house, and which are essential to its enjoyment, will pass to the devisee (*n*). And in like manner, things that are constructively annexed to the house,

(*l*) Shep. Touch. 469, 470; Cowell's Inst. lib. 2, tit. xx. pl. 12; *D'Eyncourt v. Gregory*, L. R., 3 Eq. 382.

(*m*) See 7 Will. 4 & 1 Vict. c. 26, s. 24.

(*n*) Shep. Touch., *supra*; *Herlakenden's Case*, 4 Co. 62 a. And see *Colegrave v. Dias Santos*, 2 B. & C. at p. 80, per Best, J.; *In re Sharman's Estate*, W. N. 1873, p. 99.

as the locks, keys, and rings, &c., will go to the devisee (o). And so of any other matter that is incident to the principal thing, although it may be distinct from it; and, therefore, if the owner of a mill take out one of the mill-stones to pick or gravel it, and devise the mill while the stone is severed from it, yet it shall pass as part of the mill (p).

Chap. V. s. 4.

It is conceived, however, that an exception from this rule will be found to exist in respect of the class of fixtures (if any) (*q*) which do not pass to the heir as part of the inheritance, but are held to be personal assets in the hands of the executor. It would seem to follow, that as between the executor and the devisee of the land, the devisee would not be entitled to these under a general devise of the realty. This point, however, is not altogether free from difficulty; for although in ordinary cases the devisee takes the land in the same condition as it would have descended to the heir, yet, it should be recollected, that the devisee of land is entitled to *emblems*, (which are very analogous to fixtures), and may claim them as against the executor, notwithstanding the heir would not have taken them with the estate (*r*). In one case, which was a conveyance by deed, a testator had covenanted to grant a house and all things fixed to the freehold of the house; and on a question between the covenantee and the defendant, who was the executor and devisee of the house in trust to settle it according to the covenant, it was held, that articles of the description just referred to, viz., hangings and looking-glasses fixed to the walls of the house, were not within the testator's covenant, because they were not to be taken as part of the house (*s*). From this decision it might perhaps be inferred that such fixtures would not be comprised under a corresponding devise in a will.

Whether executor's fixtures pass to devisee.

**Grant of
house and all
things fixed
to freehold.**

(o) *Liford's case*, 11 Co. at p. 50 b. See *ante*, p. 277. (q) See *ante*, pp. 237, 248.
(p) *R. v. Wheeler*, 6 Mod. 187, per Holt, C. J.; *Place v. Fagg*, 4 M. & R. 277; and (r) See *ante*, p. 272.
(s) *Beck v. Rebow*, 1 P. Wms. 94.

Part I.

Fixtures pass
by a bequest
for charitable
purposes.

Under the Mortmain Act (*t*), which in certain cases avoids devises of lands and bequests relating to interests in real property, it was held by the Vice Chancellor of England, that fixtures in a leasehold house of a testator, such as he was entitled to remove, would pass under a bequest of residue of personal estate for charitable purposes; for these were considered by the Vice Chancellor as mere personal chattels (*u*).

Fixtures, how
described in a
devise.

With respect to the language of a devise relating to fixtures, it should be observed, that where it is the intention of a testator expressly to devise fixtures in separation from the freehold, or that the devisee of the land should take all appendages to the land, it is necessary to specify the articles by some appropriate term or description. For there are decisions to the effect that things fixed to the freehold will not be included under terms which are usually applied to property of a mere chattel nature. Thus under the term "furniture," in a devise, it was holden that the devisee was not entitled to articles fixed to the freehold of the testator's house, notwithstanding they were matters of mere ornament. In the case of *Allen v. Allen* (*x*), a testator gave to the defendant, *inter alia*, his furniture, jewels, &c.; on a bill brought by the heir of the testator, it appeared that the defendant claimed under this devise certain marble slabs and chimney-pieces fixed in a house of which the testator was the owner in fee, and certain other slabs and chimney-pieces belonging to a house of which the testator was tenant for years. It was contended that all these things passed to the devisee, because they were ornaments every day taken down by tenants, and also upon executions. But Lord Chancellor King held, that by the word furniture, the devisee was not entitled to the marble slabs

Will not pass
as "furni-
ture."

(*t*) 9 Geo. 2, c. 36.

(*u*) *Johnston v. Swann*, 3 Madd. 457.

(*x*) Mosely, 112. But see *Paton v. Sheppard*, *post*, p. 326.

or chimney-pieces or any thing fixed to the freehold on the testator's own estate. And he said, that glasses in panels were to be considered as part of the freehold, but not if they were screwed in (*y*); and that there was a great difference between the heir and devisee, or the executor and devisee, and a landlord and tenant. So where a testator gave by his will all his household goods and implements of household; it was held by Lord Chancellor Talbot, that under this bequest a clock in the house would pass, "if not fixed to the house" (*z*). From whence it may be concluded that articles of this description, if actually fixed to the freehold, would not be included under a bequest of household goods (*a*). Chap. V. s. 4.
Nor as
"household
goods."

The term "fixed furniture," however, will be sufficient to comprehend articles of this description; and may embrace, perhaps, even more than the term "fixtures" in its strict sense. Thus a testator bequeathed his leasehold messuage, with the grates, coffers, locks, &c., "and other fixtures and fixed furniture" to A. for life; and the household goods, furniture, plate, &c., and other properties in the messuage not being comprehended under the preceding terms "fixtures and fixed furniture," to him absolutely. There were in the messuage some looking-glasses, which were standing on the chimney-pieces and nailed to the walls, and a bookcase standing on brackets and screwed to the wall. It was held that these were comprehended under the term "fixed furniture" in the will, and that A. took only a life-interest therein (*b*). But included
under "fixed
furniture."

(*y*) But see *ante*, Chap. I. p. 8. *of Bute, ante*, p. 218 in *notis*.

(*z*) *Slanning v. Style*, 3 P. Wms. 334. See *ante*, p. 8. (*b*) *Birch v. Dawson*, 2 A. & E. 37. See the report of the case at Nisi Prius, where

(*a*) And see Burn's Ecc. Law, vol. 4, p. 201; Swinb. Wills, pt. 7, § 10; Godolph. Orph. Leg. pt. 3, ch. 20, § 12. Littledale, J., expresses a doubt whether a carpet tacked to the floor is fixed furniture. 6 C. & P. 658; and see *ante*, p. 8. See, however, *Stuart v. Earl*

Part I.

Gifts of "furniture" in leasehold house.

Or, "household furniture."

Finney v. Grice.

Mr. Serjeant Hill, in his MS. notes (c), in referring to the above-mentioned case of *Allen v. Allen*, remarks that it seems admitted in the case that the legatee of "furniture" should have the slabs and chimney-pieces in the testator's dwelling-house, of which he was only tenant for years. The suggested distinction seems to be, that in the latter case, the articles may be considered to partake more of the nature of personalty, because the testator has only a chattel interest in the estate itself (d). And there is a subsequent decision in conformity with this view of the case. For where a testator made a bequest of his "household furniture," it was held that fixtures consisting of stoves, blinds, bell-pulls, and other articles generally considered as tenant's fixtures, belonging to the testator and in a leasehold house occupied by him, would pass: and the Vice-Chancellor said the articles in question were not less furniture because they were fixed to the house (e). But this case must be taken to have been decided with reference to its special circumstances, as indicating the intention of the testator. This is shown by the recent case of *Finney v. Grice* (f). There the testator bequeathed to his wife all his household furniture, plate, linen, &c., and devised and bequeathed his residuary estate to trustees in trust for sale. On the sale of a leasehold house the widow claimed the tenant's fixtures, and the above case of *Paton v. Sheppard* was relied upon in her favour. Jessel, M. R., however, said, "I dissent most emphatically from the proposition that 'where the owner of a leasehold house containing tenant's fixtures bequeathes the house to A., and the 'furniture' to

(c) See his copy of Vin. Ab. in Linc. Inn Library, vol. xiv. p. 319, tit. House (E.).

(d) The case before the Court does not, however, seem to involve this point. It is clear the heir was not entitled to the fixtures on the leasehold estate; but the

question would still remain whether, as between the devisee and the executor, they would pass to the devisee as furniture.

(e) *Paton v. Sheppard*, 10 Sim. 186; and see Jarman on Wills (4th ed.), vol. 1, p. 757.

(f) 10 Ch. D. 13.

“ B., that entitles B. to remove the mantel-pieces, stoves, Chap. V. s. 4.
 “ kitchen dressers and shelves, and articles of that kind.
 “ In my opinion it is clear that whether you regard the
 “ ordinary use of language, or the technicalities of the law
 “ relating to fixtures, such articles do not pass under the
 “ word ‘furniture.’” His Lordship then intimated that
 in *Paton v. Sheppard* there were special circumstances.

In the case of wills, however, the intention of parties Intention of
testator; how
indicated.
 more than any particular form of expression is the criterion
 to be resorted to, for ascertaining whether things affixed
 pass by a conveyance of the real or of the personal estate.
 And with respect to this it may be observed, that the in-
 tention of a testator may frequently be indicated by the
 circumstance of the articles having been used together
 with the premises during the lifetime of the party (*g*).
 Thus where a testator devised his copyhold estate, con-
 sisting of a brewhouse and malthouse; under this devise
 the plant of the brewhouse was held to pass with the brew-
 house itself, although there was a bequest of the personal
 estate to another; for the Court, without reference to the
 doctrine of fixtures, presumed that from the circumstance
 of their having been in lease together, the testator must
 be understood to have devised them together (*h*).

So, in *Pinder v. Pinder* (*i*), where the testator gave his *Pinder v.*
Pinder.
 real and leasehold estates at B., and also his stock in
 trade, goodwill and effects belonging to his business of a
 manufacturer, to his son A., and charged *his estates* with
 payment of legacies to his other children; Malins, V. C.,
 held that, it being the intention of the testator that A.
 should have the business, trade fixtures passed to him

(*g*) As to the effect of cus-
 tom in such cases, see *Lowther*
v. Cavendish, 1 Ed. 99, 118;
ante, p. 240.

(*h*) *Wood v. Gaynon*, Amb.
 395. And see upon this sub-
 ject, *Gulliver d. Jeffereys v.*

Poyntz, 3 Wils. 141; *Buck v.*
Norton, 1 Bos. & Pul. 53;
Doe d. Clements v. Collins, 2
 T. R. 498; *Press v. Parker*,
 2 Bing. 456; *Bodenham v.*
Pritchard, 1 B. & C. 350.

(*i*) 18 W. R. 309.

Part I.

under the bequest of stock in trade and effects, and not under the devise of real and leasehold estates charged with the legacies (*k*).



SECTION V.

Of the Form of Agreements as affected by the Statute of Frauds; and of Stamps.

Agreement
for fixtures,
whether
within the
Statute of
Frauds.

It remains now to mention a few particulars respecting the proper formalities to be observed in agreements and conveyances relating to fixtures. And the most important question that occurs upon this subject is, whether contracts which relate to the sale and transfer of fixtures can be considered to fall within the provisions of either the fourth or the seventeenth sections of the Statute of Frauds (*l*). Although this question may be supposed to have frequently arisen, as well upon original demises between landlords and tenants, as upon assignments between out-going and in-coming tenants, and upon sales under executions, yet there are but few cases in which it has been the subject of judicial decision. Where, indeed, the contract relates to a transfer of fixtures together with the land, it clearly falls within the fourth section of the statute; and it is apprehended that in such a case any agreement for the sale, valuation, &c., of the fixtures, although it may be of a chattel interest only, must be in writing, and executed according to the formalities required by the statute (*m*).

(*k*) As regards growing crops, these will pass under a bequest of farming stock. *In re Roose*, 17 Ch. D. 696.

(*l*) 29 Car. II. c. 3.

(*m*) See as to an agreement for house and furniture being within the statute, *Mechelen v. Wallace*, 7 A. & E. 49. So an agreement to take premises, and to pay for furniture and fixtures, &c., is an agreement relating to an interest

in land, and must be in writing, *Vaughan v. Hancock*, 16 L. J., C. P. 1. In both these cases the Court were of opinion that the contracts were entire, and that being void in part, they must be void *in toto*. And see *Kelly v. Webster*, 21 L. J., C. P. 163; *Ronayne v. Sherrard*, 11 Ir. R., C. L. 146, distinguishing *Green v. Saddington*, 7 E. & B. 503.

But the question has given rise to greater doubt when things annexed to the freehold are sold in contemplation of an immediate severance, and the contract takes place between parties who do not transfer any interest whatever in the land. In this case the subject of the contract is in the view of the parties a bare chattel; and, as was observed by Lord Ellenborough in the case of *Parker v. Staniland* (*n*), it does not follow because articles are not at the time of the contract in the shape of personal chattels, as not being severed from the land so that larceny might be committed of them (*o*), that therefore the contract for the purchase of them passes an interest in land within the fourth section of the Statute of Frauds. Accordingly the case of *Hallen v. Runder* (*p*) is a distinct authority that a sale of fixtures by a tenant does not fall within the provisions of that section. In that case a tenant a few days previous to the expiration of his tenancy agreed with his landlord, and at his request, to leave the fixtures, the latter engaging to take them at a valuation; the tenant accordingly gave up possession of the premises with the fixtures to the landlord, and the fixtures were afterwards valued by brokers on each side at above 10*l.*, and they signed the appraisement. It was held by the Court of Exchequer that this was not a sale of any interest in land within the above section of the statute. It is clear that a sale by a tenant of fixtures alone, is not in any sense a sale or parting with an interest in land. In such a case if the sale be to a person taking or having an interest in the land, as to an incoming tenant or the landlord, the transaction is in the nature only of an abandonment or waiver of the vendor's right to sever the fixtures; or, if the purchaser be a person who has no interest in the soil, it amounts to a transfer of the same right (*q*).

Chap. V. s. 5.

Sale of fixtures in contemplation of severance.

Sale of tenant's fixtures by valuation, not within the statute.

(*n*) 11 East, 362, 365.

(*o*) See *post*, p. 398.

(*p*) 1 Cr. M. & R. 266, followed in *Lee v. Gaskell*, 1

Q. B. D. 700.

(*q*) See per Cresswell, J., in *Kelly v. Webster*, 12 C. B. at p. 289; per Cockburn, C. J.,

Part I.

Sale of reversionary interest in fixtures by parol.

Sale of fixtures by owner in fee, whether within the statute.

Analogy of sale of growing crops—*fructus naturales*;

Fructus industriales.

In a case at Nisi Prius, it was ruled by Cresswell, J., that a reversionary interest in trade fixtures, *e.g.*, a steam boiler, would pass to a purchaser under a parol agreement, and that a deed was not in such a case necessary (*r*). It does not, as yet, appear to have been determined whether a sale by an owner in fee or tenant in tail (*s*), of articles annexed to the freehold, falls within the 4th section. In this case the vendor has not a mere right to sever the articles, but he has the absolute property in the things sold. It is by no means easy to express a definite opinion upon this point, but it is submitted that the question must be decided upon the analogy of the cases as to the sale of things growing in the soil (*t*). Such things are divided into two classes, *fructus naturales* and *fructus industriales*. As regards the first class, the decisions show that a sale of such things, *e.g.*, growing grass, apples, &c., where the property passes to the purchaser before severance, but it is contemplated that they shall remain in the soil until maturity, is a transfer of an interest in land within the 4th section (*u*). On the other hand, it seems according to the latest decision upon the point, that although the property passes before they are severed, yet if it is intended that there shall be an immediate severance from the soil, that section does not apply (*x*). The law regards *fructus industriales*, however, in a different light, and although, strictly speaking, growing crops of this class, *e.g.*, corn, potatoes, &c., are a part of the realty (*y*), they are so far

in *Lee v. Gaskell*, 1 Q. B. D. at p. 701; Blackburn on Sale, p. 20. And see *ante*, Chap. I. p. 28.

(*r*) *Petrie v. Dawson*, 2 C. & K. 138.

(*s*) *Ante*, pp. 33, 186. As to the rights of a tenant for life, see *ante*, p. 187, and *post*, p. 331, note (*a*).

(*t*) See *Hallen v. Runder*, 1 Cr. M. & R. at p. 275; but

see per Cockburn, C. J., in *Lee v. Gaskell*, 1 Q. B. D. at p. 702.

(*u*) *Crosby v. Wadsworth*, 6 East, 602; *Rodwell v. Phillips*, 9 M. & W. 501.

(*x*) *Marshall v. Green*, 1 C. P. D. 35.

(*y*) *Brantom v. Griffiths*, 1 C. P. D. at p. 353, per Brett, J.; affirmed, 2 C. P. D. 212.

considered as chattels, that a sale of them is in no case within the 4th section of the statute (z). Chap. V. s. 5.

An application of the principles upon which these decisions are founded to the case of a sale of fixtures by an owner in fee or tenant in tail, seems to authorize the following propositions. First, where the sale is of articles so annexed to the freehold that they would pass to the heir of the vendor as against his executor, and the property passes immediately to the purchaser, but it is intended that the articles should remain annexed for any considerable period, the 4th section is applicable. Secondly, a sale of, and transfer of property in, fixtures to which the executor would be entitled and not the heir, is not within the provisions of that section, although immediate severance is not contemplated (a).

Sale of fixtures passing to heir, where no immediate severance, is within sect. 4.

Secus, as to fixtures passing to executor.

It remains to consider the case of a sale of articles to which the heir would be entitled (b), where the property passes before severance, but it is intended that the purchaser shall forthwith sever and remove the things sold. In this instance, were it not for the decision in *Marshall v. Green* (c), the transaction would, it is thought, fall within the provisions of the section, because the vendor conveys to the purchaser the property in things which are for all purposes in contemplation of law a part of the land (d). That

Sale of fixtures passing to heir, where immediate severance contemplated.

(z) *Evans v. Roberts*, 5 B. & C. 829; *Jones v. Flint*, 10 A. & E. 753; *Marshall v. Green*, *supra*. And see *Mayfield v. Wadsley*, 3 B. & C. 357; *ante*, p. 265 *et seq.*; and *post*, p. 333.

(a) The same remark would apply to a sale by a tenant for life of fixtures which he has a right to sever (*ante*, p. 187); or to a sale by a tenant for years of fixtures of which

he is, under the Agricultural Holdings Act, 1883 (*ante*, p. 92), in exception to the general rule, the owner.

(b) *Ante*, p. 211 *et seq.*

(c) *Supra*.

(d) Thus, it appears to have been considered by the Court of Exchequer in Ireland that a sale of the materials of a house would be within the section. *Ronayne v. Sherrard*, 11 Ir. R., C. L. 146, 151.

Part I.

Contract executed by appraisement.

case, however, appears to have gone further than any other decision upon the section, at least, if the Court thought that the property passed before the trees were cut, for if that be so the judgment depends entirely upon the consideration that the buyer was not to derive any benefit from the land (*e*). Accepting this as an authority, therefore, it seems that in the above instance the transaction would be outside the scope of the section. In such a case, however, even if the articles while they subsisted in a state of annexation were to be considered an interest in land within the statute, it appears from analogy to the cases relating to the sale of trees, &c., that a contract which could not be enforced for want of the requisites of the statute, might give a right of action where it had been executed by an appraisement having been made of the things sold (*f*).

Agreement to erect fixtures not within sect. 4.

It is plain that a mere agreement to erect fixtures is not within the Statute of Frauds, whether it be an agreement by the landlord to erect them upon land already demised to a tenant, or, *à fortiori*, by any other person not having an interest in the land (*g*).

Sale of fixtures by tenant not within sect. 17.

Upon the question whether contracts which relate to the sale and transfer of fixtures fall within the provisions of the 17th section of the Statute of Frauds, the case of *Hallen v. Runder* (*h*), already referred to, further decided that upon a sale of fixtures by a tenant, a note in writing was not necessary as upon a sale of goods above 10*l.* under

(*e*) See per Brett, J., 1 C. P. D. at p. 42.

(*f*) See *Hallen v. Runder*, 1 Cr. M. & R. 266, *ante*, p. 329; *Poulter v. Killingbeck*, 1 Bos. & Pul. 397; *Teal v. Auty*, 2 Brod. & Bing. 99. See also as to the effect of an appraisement of fixtures, *Salmon v. Watson*, 4 Moore (C. P.), 73; see further, *Green v. Sadding-*

ton, 7 E. & B. 503 (distinguished in *Ronayne v. Sherard*, 11 Ir. R., C. L. 146); *Dart's Vendors and Purchasers* (5th ed.), p. 200; *Leake on Contracts* (2nd ed.), p. 249 *et seq.*

(*g*) *Mann v. Nunn*, 43 L. J., C. P. 241; *Donellan v. Read*, 3 B. & Ad. 899.

(*h*) See *ante*, p. 329.

that section. To the same effect is the decision in *Lee v. Gaskell* (i), decided in 1876, where the action was for the price of certain fixtures. It appeared that a tenant having become bankrupt, the trustee sold the tenant's fixtures whilst still unsevered to the plaintiff, who subsequently sold them to the defendant (the landlord) without any agreement or memorandum in writing. The Queen's Bench Division held that *Hallen v. Runder* was directly in point and binding upon them, and that fixtures, although they may be removable during the tenancy, as long as they remain unsevered are part of the freehold, and cannot be disposed of to the landlord or anyone else as goods and chattels.

Chap. V. s. 5.

Lee v. Gaskell.

Although in the recent edition of a work of high authority (k), a doubt is intimated whether a sale of fixtures to a person other than the landlord is not within the section, it is apprehended that no distinction exists in this respect, as well for the reasons given in *Lee v. Gaskell*, as from the fact that, as has been already pointed out (l), all that the tenant has to transfer in either event is a right to sever the things sold. Such a right cannot be regarded as goods, wares or merchandizes.

Sale to person other than landlord.

It is somewhat curious that, whilst it is clear that a sale of *fructus naturales* is not a sale of goods within the 17th section, the question whether a sale of *fructus industriales* whilst in the soil, is within the section does not hitherto appear to have been decided. We have already seen that a sale of such things does not fall within the 4th section, because they are to a certain extent looked upon as chattels (m). They are, however, looked upon as such only for certain purposes; viz., as between heir and executor, or executor and remainderman (n), and

Sale of growing crops whether within sect. 17.

(i) 1 Q. B. D. 700.

(k) Benjamin on Sales (3rd ed.), p. 118.

(l) *Ante*, p. 329.

(m) *Ante*, p. 330.

(n) *Ante*, p. 265 *et seq.*

Part I.

for the purposes of execution (*o*) and distress (*p*). In all other respects they are no less a part of the land than tenants' fixtures (*q*). In *Evans v. Roberts* (*r*), however, one at least of the learned judges (*s*) expressed an opinion that a sale of growing produce of this class is a sale of goods, wares, and merchandise within the meaning of the section; and he appears to have thought that tenants' fixtures stood upon the same footing. As regards these last, we have seen (*t*) that the converse has been decided, and it is proper to add that Lord Blackburn, in his well-known treatise on the contract of sale (*u*), states that the view adopted by Littledale, J., as to crops is exceedingly questionable, and that no authority was given for it. The balance of authority, therefore, would certainly seem to be against a construction of the section which would include *fructus industriales* whilst unsevered from the soil.

Sale of fixtures by freeholder not within sect. 17.

In conclusion, it is thought that the decisions in *Hallen v. Runder* and *Lee v. Gaskell* (*x*), as to tenants' fixtures, *à fortiori* authorize the inference that a sale of fixtures by a freeholder—whether tenant in fee, tenant in tail, or tenant for life—is outside the scope of the 17th section, which does not affect the sale of articles that form a portion of the freehold when sold, even though they be such as an executor might be entitled to sever and remove as against the heir (*y*). The same may, possibly, be said of the exceptional

(*o*) *Post*, p. 396, note (*m*).

(*p*) *Post*, p. 392.

(*q*) Per Brett, J., in *Brantom v. Griffiths*, 1 C. P. D. at p. 353; affirmed, 2 C. P. D. 212; and see *ante*, pp. 28, 330.

(*r*) 5 B. & C. 829.

(*s*) Littledale, J., at p. 840. The remarks of Bayley, J., to the same effect (at p. 837), were possibly meant to apply only to the facts of the particular case. See the begin-

ning of his judgment.

(*t*) *Ante*, p. 332.

(*u*) Blackburn on Sale, pp. 19, 20.

(*x*) *Ante*, pp. 332, 333.

(*y*) Of course it would be otherwise with reference to articles which, though attached to the freehold to a certain extent, never lose the character of chattels, *e.g.* pictures, mirrors, &c. See *ante*, Chap. I. p. 8.

instance of fixtures which, under the Agricultural Holdings Act, 1883 (s), remain the property of the tenant after annexation, for in such a case, it is apprehended, they none the less cease to be chattels for the time being. Chap. V. s. 5.

It is hardly necessary to state that if by the contract of sale the property in fixtures, or things growing in the soil, whether *fructus naturales* or *fructus industriales*, does not pass until after severance, the requirements of the 17th section of the Statute of Frauds must be complied with, or the contract will not be good. For in such cases the articles sold are goods and chattels at the time of delivery to the purchaser (a). Where property does not pass until after severance, sect. 17 applies.

STAMPS ON INSTRUMENTS RELATING TO FIXTURES.

A few observations occur with respect to the provisions of the Stamp Act, 1870 (b), as they apply to schedules or inventories of fixtures, and the amount of stamps on agreements, leases, &c., of fixtures. Stamps on schedules, &c., of fixtures.

These schedules or inventories are either annexed to or endorsed upon leases, &c., or they are distinct instruments which are merely referred to in the lease; and the above Act provides that a schedule inventory, or document of any kind whatsoever, referred to in or by, and intended to be used or given in evidence as part of, or as material to, any other instrument charged with any duty, but which is separate and distinct from, and not indorsed on or annexed to, such other instrument, where such other instrument is chargeable with any duty not exceeding 10s. shall be chargeable with the same duty as such instrument, and in any other case shall be chargeable with a duty of 10s. (c).

(z) 46 & 47 Vict. c. 61, s. 34. jamin on Sales (3rd ed.), p. 106 *et seq.*
See *ante*, pp. 92, 331.

(a) *Washbourn v. Burrows*, 1 Exch. 107, 115. See generally upon this subject, Ben- (b) 33 & 34 Vict. c. 97.
(c) Schedule, tit. "Schedule Inventory."

Part I.

Stamping of
unstamped,
&c., instru-
ments.

The Act also contains provisions for the stamping of unstamped or insufficiently stamped instruments, and enacts that save as therein provided, no instrument shall, except in criminal proceedings, be admissible in evidence, unless it is duly stamped (*c*). It has been held that the circumstance of such an inventory not being stamped, will not vitiate the deed itself to which it refers (*d*).

Stamps on
conveyances.

As regards conveyances it should be noticed that an instrument will require to be stamped as such, though it contains words in the past tense, if it is meant to be a record of a transfer of property. Thus, in *Horsfall v. Hey* (*e*), the plaintiff gave in evidence the following document:—“Memorandum that Mr. Thomas Hey has sold to G. Hey all the goods, stock in trade, and fixtures in the shop of Walter Hey at, &c., for 90l.” The document bore an agreement stamp only. The Court of Exchequer held that the instrument operated as an immediate conveyance of the property and, therefore, the agreement stamp was insufficient.

Stamps on
agreements.

With respect to other provisions contained in the Stamp Act, it appears that an agreement for the sale and purchase of fixtures requires a stamp, where the amount is 5l. and upwards (*f*); for such an agreement is not within the exemption in the Act relative to the sale of goods, wares or merchandise (*g*). And an instrument relating to the sale of goods, which would have been within the

(*c*) Sects. 15—17; 44 Vict. c. 12, s. 44.

(*d*) *Duck v. Braddyll*, 1 M'Clcl. 217, 235.

(*e*) 2 Exch. 778. As to stamps on conveyances, see 33 & 34 Vict. c. 97, s. 70, Schedule, tit. “Conveyance.”

(*f*) Sect. 36, and Schedule, tit. “Agreement.”

(*g*) See *Horsfall v. Hey*, *supra*; *Wick v. Hodgson*, 12 Moore (C. P.), 213; *Marson v. Short*, 2 Scott, 243, 249, per Park, J.; *Chanter v. Dickenson*, 6 Scott, N. R. 182, 190, per Erskine, J. And see *Pinner v. Arnold*, 2 Cr. M. & R. 613.

exemption, will require a stamp if it also embraces the transfer of fixtures (*h*). Chap. V. s. 5.

It has been held that an instrument containing an agreement for the purchase of fixtures in a house, and which contains also a present demise of the house, cannot be given in evidence to prove the sale of the fixtures in an action for their value, unless it has a lease stamp; the one contract being auxiliary to the other an agreement stamp is not sufficient (*i*). And where a lease reserves one rent for a house, and there is another separate and distinct reservation for the furniture and fixtures, the stamp must be to an amount in proportion to the two reservations (*k*).

Agreement for purchase of fixtures, in demise of house.

In the case of *Buxton v. Bedall* (*l*), it was held that an executory agreement for the making and putting up of machinery in a house, was not within the exemptions contained in the Stamp Acts then in force, in favour of agreements for or relating to the sale of goods, &c., but that it must be stamped like any other agreement: this decision, however, has been overruled by more modern cases (*m*). The duty formerly payable on the sale of fixtures by auction has been abolished (*n*).

Agreement to make and put up machinery.

(*h*) *Horsfall v. Hey*, *supra*.

(*i*) *Corder v. Drakeford*, 3 Taunt. 382. And see *Grey v. Smith*, 1 Camp. 387; *Nicholson v. Smith*, 3 Stark. 128; *Clayton v. Burtenshaw*, 5 B. & C. 41, and the cases cited in note (*g*), *supra*.

(*k*) *Coster v. Cowling*, 7 Bing. 456; *Clayton v. Burtenshaw*, *supra*.

(*l*) 3 East, 303.

(*m*) *Wilks v. Atkinson*, 6 Taunt. 11; *Hughes v. Breeds*, 2 C. & P. 159, *per* Abbott, C. J.; *Garbutt v. Watson*, 5 B. & Ald. 613; *Pinner v.*

Arnold, 2 Cr., M. & R. 613; *Marson v. Short*, 2 Scott, 243; *Chanter v. Dickenson*, 6 Scott, N. R. 182, 190. See 9 Geo. 4, c. 14, s. 8, as to stamp duties on executory contracts for the sale of *goods* of the value of 10*l.* and upwards within that statute. This section is not repealed by 33 & 34 Vict. c. 99, and is still applicable; see 33 & 34 Vict. c. 97, s. 3.

(*n*) For the stamps required on valuations of fixtures, and for other points connected with such valuations, the reader is referred to Appendix (C).

CHAPTER VI.

ON THE RIGHTS AND LIABILITIES OF PARTIES IN RESPECT
OF LAND AS INCREASED IN VALUE BY THE ANNEXA-
TION OF PERSONAL CHATTELS.Part I.

THE law, in a variety of instances, determines the liabilities of persons to perform public duties, or to contribute to public charges, in consequence of the possession of real property. In like manner it confers many important rights on freeholders and tenants of inferior estates, by reason of their interest in land. In these instances it is frequently necessary to ascertain the precise value of the property; and wherever that value has been increased by the annexation of personal chattels to the freehold, it will be important to take into consideration the nature and doctrine of fixtures.

Land rateable
to the poor
according to
its value im-
proved by
annexations.

Thus, with respect to the liabilities of persons to make contribution to the poor rates, the statute 43 Eliz. c. 2, enacts that competent sums, to be levied for the purposes therein specified, should be raised by the taxation of every occupier of lands and houses in a parish. And in the construction of this statute it is held that land and houses are to be rated according to their annual value, although that value may be in part derived from the annexation of personal chattels (*a*).

(*a*) The mode in which the net annual value is to be estimated is provided for by 6 & 7 Will. 4, c. 96, s. 1. See 25 & 26 Vict. c. 103, ss. 15, 36; 27 & 28 Vict. c. 39; 32 & 33 Vict. c. 41; 43 & 44 Vict. c. 7. As to the metropolis, see 32 & 33 Vict. c. 67. The object of the statute of Will. 4 is merely to determine the rela-

tive liabilities of parties, and it in no way affects the principles discussed in the text. The statute of Elizabeth made personal, as well as real property, rateable; but the rateability of the former, which had long been practically exempt, was abolished by 3 & 4 Vict. c. 89. This Act has been continued annually ever since.

Thus, a corporation, being possessed of a house, erected a machine in the street leading by the house, for the purpose of weighing waggons loaded with coal, &c., at 2*d.* per ton. The steel-yard of the weighing machine was, and always had been, in the house. The corporation was rated for the *machine house* according to the annual value not only of the house itself, but of the clear profits of the machine. The Court held the rate good: and Lord Mansfield observed, that the nature of the thing showed that the machine was annexed to the freehold; they were one entire thing, and were together rated by the common name (the machine house), which comprehended both; the steel-yard was the most valuable part of the house; the house therefore applied to this use might be said to be built for the steel-yard, and not the steel-yard for the house (*b*).

Value increased by a steel-yard in a machine-house;

In another case (*c*) a building called the Engine House consisted of a bay of building in which there was a carding machine for manufacturing cotton. The engine was generally worked with water, but frequently by the hand. The building wherein the engine stood was not a dwelling-house, nor was it erected for the purpose of receiving the engine. The engine was placed on the floor; and the case stated that it was not annexed or fastened *to the floor* (*d*), but might be moved at pleasure and carried out and worked in any other place, either by means of water or manual labour, and was not adapted to any particular building. The Court thought that, notwithstanding the above statements, this case was not distinguishable from the preceding one of *Rex v. St. Nicholas, Gloucester*; and accordingly they held, that, as the whole was let as an entirety, the house and engine ought to be rated as one

By a carding machine;

(*b*) *R. v. St. Nicholas, Gloucester*, Cald. 262. however, whether or not the engine was fastened to the

(*c*) *R. v. Hogg*, Cald. 266. walls. See per Ashhurst, J.,

(*d*) The case did not state, at p. 278.

Part I.

By a steam-engine and railway in mine ;

Or by any machinery constituting mode of occupation.

entire subject. Again, where the lessee and occupier of a coal mine erected steam engines for draining and working the mine, and laid down a railway for the use of the mine, and thereby improved its annual value, these forming the machinery without which the mine could not be worked ; it was held that he was rateable for such improved value, at the amount as increased by reason of the improvement from the engine and railway (*e*).

To the like effect is the case of *Rex v. Birmingham and Stafford Gas Company* (*f*), in which the same general principle was adhered to. And in delivering the judgment in that case Lord Denman, C. J., said, in respect of machinery attached to houses, &c., "Such machinery constitutes a mode of occupying : that really is clear from the beginning to the end of all the cases on the subject. This principle has never been called in question ; and, even where the machine has not been attached, a house has been held rateable in respect of it, if the value of the house was increased by the machine." And in another case, which followed shortly afterwards (*g*), the rule is laid down in the same terms. And the same learned judge said, "Real property ought to be rated according to its actual value, as combined with the machinery attached to it, without considering whether the machinery be real or personal property, so as to be liable to distress or seizure under a *fieri facias*, or whether it would descend to the heir or executor, or belong, at the expiration of a lease, to landlord or tenant."

Cranes, &c. in docks.

The two last-mentioned cases were followed in the year 1851 in *Regina v. Southampton Dock Co.* (*h*), in which Lord Campbell, C. J., who gave the judgment of the Court, said

(*e*) *R. v. Lord Granville*, 9 B. & C. 188. It does not appear from the report whether the engines and railway were annexed to the realty or not. See *ante*, p. 5.

(*f*) 6 A. & E. 634.

(*g*) *R. v. Guest*, 7 A. & E. 951. And see *Brown v. Lord Granville*, 10 Bing. 69.

(*h*) 14 Q. B. 587.

that they saw no reason why the rule laid down in those cases should be disturbed. The Court, therefore, refused to make a deduction in respect of the cranes, steam-engines and other fixed machinery used in the business of the company. In the same year a like decision was given in *Regina v. Haslam* (i). There the occupiers of certain chemical works claimed that they ought not to be assessed at an increased rate for certain large leaden chambers, which were part of their works used in the manufacture of sulphuric acid. The mode of erecting the chambers was as follows:—Foundation walls were built in the shape of an oblong, and the space inside was filled with sand to a level with the top of the walls. Each chamber rested on the sand, but a wooden sill was laid on the top of the walls, and on this was fixed a framework to which the chamber was riveted (j). The chambers were connected by pipes with buildings, and also with a boiler which was fixed to the freehold. The special case stated that the chambers were attached in manner before mentioned to the freehold, but were not affixed thereto. The Court said that it was unnecessary to determine whether the chambers were or were not annexed to the freehold, because they were of opinion that according to the principle laid down in the various cases on the subject, the rateable value of the premises was undoubtedly increased by the use of the chambers. It had been urged that the chambers were rather in the nature of moveable utensils or machines, or furniture in a dwelling-house, than of fixtures. It was, however, plain from the facts stated, that they were used as part of the fixed machinery of the works, attached to the other buildings for the purpose of being so used, and necessarily so attached in the use of them, although capable, perhaps, of being removed without injury to the other buildings.

Chambers in
chemical
works.

(i) 17 Q. B. 220.

(j) In some cases, however,

the sills were placed on mortar
spread on the walls.

Part I.

Articles for
which railway
companies
rateable.

In *Regina v. North Staffordshire Rail. Co. (k)*, the Court divided the articles necessary for carrying on the business of the company into three classes. First, things moveable—such as office and station furniture; secondly things so attached to the freehold as to become part of it; and, thirdly, things which though capable of being removed were yet so far attached as that it was intended that they should remain permanently connected with the railway, or the premises used with it, and remain permanent appendages to it, as essential to its working. It was held, that a deduction should be allowed in respect of the first class, but that both the second and third must be taken into account in determining the rateable value (*l*).

Articles in
gas works.

So it has been held that, in ascertaining the rateable value of land used for gas works, the value of the retorts, purifiers (*m*), steam-engines, gas-holders, pumps and exhausters must be taken into account, although as a fact, according to the practice in letting and hiring gas works, the tenant would have to purchase or provide all these articles. For the Court must look to what a hypothetical tenant would give for the premises as they stand, with those portions which are annexed to the property so as in

Court must
look to what
hypothetical
tenant would
give for pre-
mises.

(*k*) 30 L. J., M. C. 68. As to the principle to be adopted as the proper measure of the rateable value of a railway, see this case, and *R. v. Grand Junction Rail. Co.*, 4 Q. B. 18; *R. v. G. W. R. Co.*, 6 Q. B. 179; *G. E. R. Co. v. Haughley*, L. R., 1 Q. B. 666; *R. v. Llantrissant*, L. R., 4 Q. B. 354; *R. v. L. & N. W. R. Co.*, L. R., 9 Q. B. 134.

(*l*) As to the rating of a factory in which machinery is kept, although not in use, see *Staley v. Castleton*, 5 B. & S. 505; *Harter v. Salford*, 6 B.

& S. 591. And see *Staunton v. Powell*, 1 Ir. R., C. L. 182.

(*m*) The purifiers were massive iron vessels standing on a brick base, but not fixed thereto, being retained in position by their own weight. Pipes, however, were attached to them on each side, and by this means connected them with the retorts and gasholders. It is noticeable that the Court made no distinction between the purifiers and the articles which were actually annexed to the freehold.

effect to become part of the rateable subject; and, therefore, it is immaterial that the actual tenant would not pay rent for portions of the property, but would purchase them (*n*). On the other hand, it was decided that gas meters, which stand in the houses of the consumers and are attached merely by pipes coming through the walls, should not be included in the assessment (*o*).

It must be borne in mind, however, that a distinction has been made between things which are rateable *per se*, and things which, although not themselves rateable, may be taken into account as enhancing the value of a rateable subject. This is well illustrated by the two following cases:—In *Chidley v. Churchwardens of West Ham* (*p*) the Court was asked to determine whether certain vessels and utensils in a distillery, all of which were necessarily used in the process of distilling, were liable to be rated. The articles in question were not attached to the premises (*q*), except in the sense that they rested by their own weight on girders or piers, and were connected with pipes which again were attached to fixtures. The Court held that the articles were mere chattels, and consequently were not rateable (*r*). But Blackburn, J., said, “I am not prepared to say that “the various articles described in the present case may

Distinction between things rateable and things enhancing value.

Chidley v. West Ham—utensils in distillery.

(*n*) *R. v. Lee*, L. R., 1 Q. B. 241.

(*o*) *S. C.* It is difficult to see, however, in what respect the meters differed from the purifiers *as regards the mere mode of attachment*. See note (*m*), *supra*. The real distinction lay, it would seem, in the fact that the former were not essential to the works. See *post*, p. 345.

(*p*) 32 L. T. 486. And see *R. v. Morrison*, 1 E. & B. 150, 161.

(*q*) Except in the instance

of two pumps, as to which see *ante*, pp. 16, 17.

(*r*) The better opinion would seem to be, therefore, that an article retained in position by its own weight does not become a fixture by reason only that it is connected with the soil, or with fixtures, by pipes. See *ante*, p. 14. In this view the decision in *R. v. Lee*, *supra*, as to the purifiers, must be supported on the ground that although not themselves rateable they enhanced the value of the rateable premises.

Part I.

Laing v.
Bishopwear-
mouth—plant
in shipbuild-
ing-yard.

“ not be taken into account as enhancing the value of the premises, but that question is not asked, and we are only to say whether the things are rateable. That depends, as is stated in *Holland v. Hodgson* (s), on whether they are annexed to the freehold, and, if they are annexed in a certain sense, with what intent they were so annexed.”

The remarks of the learned judge appear, therefore, to coincide with the view taken by the Court in the above case of *Reg. v. Haslam* (t); and this is borne out by the decision in the still more recent case of *Laing v. Bishopwearmouth* (u). There the appellant was the owner and occupier of an extensive ship-building yard, and the question asked of the Court was whether certain machinery and plant used by him were to be taken into consideration as enhancing the rateable value of the hereditaments (v). Much of the machinery was so annexed to the freehold, by being bolted to foundations or sunk in the ground, as to have ceased, according to the rules laid down in an earlier portion of this work, to be chattels (w). But amongst the other articles were the following:—(a) A boiler standing on a cast-iron plate sunk into the ground, but not itself fixed in any way to the plate; the steam pipes connected with this boiler were carried underground (x):—(b) A portable engine with boiler, mounted on wheels:—(c) Other machines resting on but not attached to concrete foundations, wooden sleepers, or blocks of wood or stone (y):—(d) A weighing machine mounted on wheels, and a water tank placed on blocks of wood laid on the surface

(s) L. R., 7 C. P. 328; *ante*, p. 15.

(t) *Ante*, p. 341.

(u) 3 Q. B. D. 299.

(v) In *R. v. Morrison*, 1 E. & B. 150, it was held that a floating dock used by the occupier of a shipbuilding yard, and attached thereto and to the bed of a river by chains and moorings, but floating

sometimes in the parish in which the yard was situate and sometimes in an adjoining parish, could not be taken into account as enhancing the rateable value of the yard. See *post*, p. 347, note (f).

(w) *Ante*, Chap. I. pp. 6, 19.

(x) *Ante*, p. 343, note (r).

(y) *Ante*, Chap. I. p. 4.

of the ground. All these articles, therefore, must be taken to have been chattels according to the principles mentioned in the first chapter. The judgment of the Court was delivered by Cockburn, C. J., who said, "The law on the subject of rating with reference to premises on which machinery has been erected with a view to the use of such premises for the purpose of manufacture, is settled by former decisions (z). . . . Applying the rule established by these decisions to the present case, it appears to us, after having carefully considered the character of the machinery in question, that the whole of it, though some of it may be capable of being removed without injury to itself or the freehold, is essentially necessary to the shipbuilding business to which the appellant's premises are devoted, and must be taken to be intended to remain permanently attached to them so long as those premises are applied to their present purpose. The case is consequently governed by the decisions which have been referred to, and our judgment must therefore be for the respondents."

There is no doubt that moveable furniture is not to be taken into account in ascertaining the value of a dwelling

Moveable furniture not to be taken into account.

(z) His Lordship referred to the above-mentioned cases of *R. v. The Birmingham & Stafford Gas Co.*, 6 A. & E. 634; *R. v. Guest*, 7 A. & E. 95; *R. v. The Southampton Dock Co.*, 14 Q. B. 587; *R. v. The North Staffordshire Rail. Co.*, 30 L. J., M. C. 68; *R. v. Lee*, L. R., 1 Q. B. 241. In the course of the argument a case of *R. v. Halstead*, 32 J. P. 118, was referred to, in which it was held that machines used in a silk manufactory, to the floor of which they were fixed by screws, were not to be included in the rateable value. Upon this, Lush, J., remarked that

it was not intended in that case to vary the rule laid down in *R. v. Lee*. A report of the case taken from the shorthand notes will be found in Hedley on Rating of Machinery, p. 43 *et seq.* No reference is made to this decision in the judgment in the principal case, and it is difficult to see how far the facts (apart from the finding of the Court of Quarter Sessions, which Cockburn, C. J., considered conclusive) justified the determination that the machines were not part of the freehold. See *ante*, Chap. I. p. 12 *et seq.*

Part I.

General observations as to result of decisions.

house (a) ; and, therefore, the dictum of Willes, J., in *Rees v. St. Nicholas, Gloucester* (b), that a house might be rateable at an advanced rate by reason of a billiard table standing in it, cannot now it is apprehended be supported, unless indeed the table was fixed to the house.

Upon a review of the decisions in the foregoing cases the reader may, it is thought, infer the following conclusions:—

- (A) All articles so annexed to the freehold as to form part of it are to be taken into account as forming part of the rateable subject, whether or not they are such as would be removable by the person affixing them, or his representatives.
- (B) Mere chattels are not rateable, nor are they, generally speaking, to be taken into account as enhancing the value of a rateable subject ; but
- (C) In assessing the value of rateable premises specially adapted for the carrying on of a particular business, chattels upon such premises should be taken into account as enhancing the value, if they are intended to be permanently used for the purposes for which the premises are adapted, and if they are essential to the use of the premises for such purposes.

The proposition involved in the last conclusion is, it is submitted, justified by the foregoing decisions. It must, however, be confessed that the actual decisions do not always appear to coincide with the reasons given for them in the judgments, and in some instances the language of the judgments seems opposed to the view that anything can be taken into account in ascertaining the rateable value of land or houses, except that which is so annexed as to be a part of the freehold.

(a) *R. v. Haslam*, 17 Q. B. 220 ; *R. v. North Staffordshire Rail. Co.*, 30 L. J., M. C. 68 ; *R. v. Lee*, L. R., 1 Q. B. 241, 253, per Blackburn, J. (b) *Cald.* 262.

Chap. VI.

Gas and
water-pipes,
tramways,
telegraphs,
&c.

The principles above considered apply also to another class of cases. Thus, where pipes are laid in the ground for the conveyance of water or gas, and profit is derived thereby to the proprietors, the pipes are to be deemed a part of the soil, and are rateable as such in the parish in which they are situated, although the ownership of the land itself may be in other individuals. In such cases the proprietors of the pipes, who are generally gas or water-works companies, are in possession of the pipes buried in the soil, and so have *de facto* a beneficial possession of the space in the soil which the pipes fill (c). So, too, a tramway company are rateable in respect of their occupation of the portion of the highway upon which the tram rails are laid down (d); and for the same reason an occupation by means of telegraph wires and posts is rateable, for there is no distinction in principle between wires passing through the air and pipes passing underground; in each case there is an exclusive occupation of a certain portion of space, whether it be above or below the surface of the soil (e). Again, there may be a rateable occupation of the soil of the bed of a river by means of a floating hulk attached to permanent moorings (f).

But to constitute a rateable beneficial occupation, such occupation must be both permanent and exclusive. In cases such as have been just mentioned, where the subject of occupation is not a surface area of land, but only a small portion of the soil, the element of permanence is

Occupation
must be per-
manent and
exclusive.

(c) *R. v. Rochdale Waterworks Co.*, 1 M. & S. 634; *R. v. Birmingham Gas Co.*, 1 B. & C. 506; *R. v. Brighton Gas Co.*, 5 B. & C. 466; *R. v. West Middlesex Waterworks Co.*, 1 E. & B. 716; *Sheffield United Gas Co. v. Sheffield*, 4 B. & S. 135.

(d) *Pimlico Tramway Co. v. Greenwich*, L. R., 9 Q. B. 9;

in which it was held that the company were none the less the exclusive occupiers of that portion of the soil because the public had a right to use the surface of the highway.

(e) *Electric Telegraph Co. v. Salford*, 11 Exch. 181.

(f) *Cory v. Bristow*, 2 App. Cas. 262.

Part I.

determined by the way in which the pipes, &c., are connected with the soil. Thus, in the cases of water mains, gas mains, telegraph posts, tramways, moorings, &c., where the rateable quality has been affirmed, the decisions have proceeded upon the ground that by the mode of attachment the chattel has been merged in the soil. In other words there has been such an annexation to the soil as to constitute a fixture (*g*). Secondly, the person whom it is sought to rate must be the exclusive occupier of the rateable subject, and not merely the grantee of a right of enjoyment, though it be exclusive. Therefore, a mere permissive user, in the nature of an easement, is not rateable (*h*).

Occupation as adjunct to non-rateable subject.

It remains to remark, that in applying the above rules, it has been decided that where there is an exclusive occupation of land, though it be solely as an adjunct to a non-rateable subject, the occupier is rateable where the land is valuable for occupation, and would be rateable in the hands of another occupier; for the rateable quality can not be affected by the use to which the land is applied. Thus, the Metropolitan Board of Works are not rateable in respect of their sewers, but they are not exempt in respect of their occupation of land by the pumping stations used solely in connection with such sewers (*i*).

(*g*) *R. v. St. Pancras*, 2 Q. B. D. 581, 589, per Lush, J. See *ante*, Chap. I. p. 27.

(*h*) *Watkins v. Milton-next-Gravesend*, L. R., 3 Q. B. 350; *Smith v. Lambeth Assessment Committee*, 10 Q. B. D. 327. But a *de facto* occupation is sufficient, for rateability does not depend upon title, *Kittow v. Liskeard Union*, L. R., 10 Q. B. at pp. 13, 15.

(*i*) *R. v. Metrop. Board of Works*, L. R., 4 Q. B. 15; *Metrop. Board of Works v.*

West Ham, L. R., 6 Q. B. 193. The case of *R. v. Bilston*, 5 B. & C. 851, which was thought to have established a contrary proposition, has been discussed and explained in several subsequent cases. See *Talargoch Lead Mining Co. v. St. Asaph*, L. R., 3 Q. B. 478; *Guest v. East Dean*, L. R., 7 Q. B. 334; *Kittow v. Liskeard Union*, L. R., 10 Q. B. 7. As to a non-beneficial occupation, see *Hare v. Putney*, 7 Q. B. D. 223.

Again, in questions respecting the settlement of the poor, it may still occasionally be necessary to refer to the doctrine of fixtures. Thus, in the case of an alleged settlement by the renting of a tenement, it may happen that although the rent actually paid amounts to 10*l.*, the sum which is requisite in order to confer a settlement by this means (*k*), a portion of that rent is paid in respect of the pauper's enjoyment of articles which are annexed to the demised premises. In such a case, if the articles are so annexed as to constitute parcel of the premises, although they are fixtures which would be removable by a tenant who had affixed them, the whole amount of the rent paid may be taken into account; and therefore it is immaterial that a deduction of the sum paid as rent for the fixtures would reduce the rent to a sum below 10*l.* (*l*). But if a portion of the rent be paid in respect of mere chattels upon the demised premises, and the deduction of such portion will reduce the rent to a sum below 10*l.*, the renting of the tenement will not confer a settlement. Thus, a pauper will gain no settlement by tenancy of a cottage and wind-mill, at a rent for the whole which exceeds 10*l.*, but which for the cottage alone does not amount to that sum, if the mill is so constructed as not to be affixed to the freehold (*m*).

(*k*) See on this subject the statutes 6 Geo. 4, c. 57; 1 Will. 4, c. 18; 4 & 5 Will. 4, c. 76, ss. 66, 68; and Burn's Justice, vol. 4, tit. Poor, p. 521 *et seq.* (30th ed.).

(*l*) *R. v. St. Dunstan's*, 4 B. & C. 686. At the period of this decision, and that of *R. v. Otley*, *infra*, the question depended upon the *value* of the tenement, and not, as now, upon the rent actually paid; but it is apprehended that this makes no difference.

(*m*) *R. v. Otley*, 1 B. & Ad. 161; *ante*, Chap. I. p. 4.

See, too, *R. v. Londonthorpe*, 6 T. R. 377; *R. v. Minworth*, 2 East, 198, and the judgment of Le Blanc, J., in that case at p. 201. If instead of *bond fide* letting there is a mere licence to use a part of the machinery of a mill, or a mere standing place in a mill for a party's own machinery, to be worked by the steam power of the mill, this would not confer a settlement, *R. v. Dodderhill*, 8 T. R. 449; *R. v. Mellor*, 2 East, 189; *Robinson v. Learoyd*, 7 M. & W. 48. As to settlements by estate, see

Part I.

Parliamentary franchise in respect of property improved by annexations.

Lastly, the principles which have been discussed in the preceding pages would, it is conceived, apply to the subject matter of the qualifications in respect of property, required by statute in order to confer the right of voting in the election of members of parliament. There is, however, only one case to be found upon this subject. It was the case of a vote at an election for the county of Bedford. A voter had polled for a windmill, which appeared in evidence to be fixed on a post, upon pattens, in a foundation of brickwork, and to be upon a plot of ground inclosed with a fence, put up by the voter in a common field. It did not appear in whom the title to the ground was, further than as it might have been inferred from possession. The vote in respect of this mill was held good by a committee (*n*). It may be observed of this case, that the committee seem to have recognized the principle, that whatever was affixed to the freehold was to be considered as land; and that if it enhanced the value of the land to the requisite amount, it would confer a right of voting. On the facts as stated in the report, it does not appear satisfactorily in what manner the windmill was connected with the soil. The case, however, does not warrant an inference that the right of voting would accrue in respect of property, the value of which is increased by a personal chattel which is not actually affixed to the freehold (*o*).

Nolan's Poor Law, vol. 2, p. 69 (4th ed.), where it is stated that the principle upon which these settlements are founded goes beyond estates in land,

and seems to extend this right to all interest in things immoveable.

(*n*) 2 Lud. Cas. p. 440.

(*o*) See *R. v. Otley*, *supra*.

PART II.

CHAPTER I.

OF REMEDIES IN RESPECT OF FIXTURES.

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SECTION I.

Of Actions for Waste, as applied to Fixtures.

HAVING in the preceding division of the work treated of the rights of different parties with regard to the property in fixtures, the next subject for consideration is the means by which those rights may be enforced, and the remedies provided by the law when they are infringed. Chap. I. s. 1.

The owners of the inheritance, in whom, in early times, the power of legislation was principally vested, secured themselves against injuries to the freehold committed by their particular tenants, by means of the law of waste. And it was held to be equally waste to damage or remove a personal chattel which had been annexed to the freehold, as where the substance of the freehold itself was impaired. Accordingly, Lord Coke, in treating upon this subject, observes, that “if glasse windowes (though glased by the “tenant himselfe) be broken or carried away, it is wast. “And so it is of wainscot, benches, doores, furnaces, and “the like, annexed or affixed to the house either by him

Injury to things affixed to the freehold is waste.

Part II.

“ in reversion or the tenant (a).” Hence it is, that many of the questions respecting the right of property in fixtures have come before the Courts in the form of an inquiry, whether the severance or removal of them was an act of waste or not. And agreeably to this view of the subject, the decisions relating to the law of fixtures are usually classed in the older text-books and digests, under the head of *Waste*. It will appear, however, from what is observed in a subsequent part of this section, that such a classification is not comprehensive enough to embrace many important determinations which constitute a part of the doctrine of fixtures.

Writ of waste,
against whom
it lay.

With respect to the remedy for waste, the old method of proceeding was by writ of waste. And it may be proper shortly to notice some particulars relative to this ancient remedy, because it is the foundation of the more modern form of action. The common law gave an action for waste in three cases only; tenancy by the curtesy, tenancy in dower, and guardianship in chivalry. These estates were created by act of law; and the tenants were from the earliest times restrained from an abuse of what the law thus conferred (b). Afterwards, by the statutes of Marlebridge (c) and Gloucester (d), an action for waste was given against lessee for life or years, tenant *pour autre vie*, and against the assignee of tenant for life or years for waste done after assignment (e). By a liberal construction of the last-mentioned statute, tenants from year to year, and tenants for a part of a year, were held punishable for waste;

(a) Co. Lit. 53 a; *Greene v. Cole*, 2 Wms. Saund. 259, n. 11.

(b) 2 Inst. 145; Co. Lit. 53 a *et seq.*; Doct. & Stud. Dial. 2, ch. 1, 2; 2 Wms. Saund. 252, n. 7. Some have thought, that at common law waste did not lie against tenant by the curtesy, 2 Inst. 145, 301; Br.

Ab. tit. Waste, 88; Harg. Co. Lit. 53 b (N. 356).

(c) 52 Hen. 3, c. 23. But see now Stat. Law Rev. Act, 1881.

(d) 6 Edw. 1, ch. 5. But see now 42 & 43 Vict. c. 59.

(e) 2 Inst. 299; Co. Lit. 54 b; 2 Wms. Saund. 252, n. 7.

which is a remarkable instance of the manner of construing statutes by equity in former times (*f*). Chap. I. s. 1.

The ancient action of waste retained several vestiges of its early introduction; and as it came into use before estates were commonly subdivided into numerous interests, it was not allowed, even afterwards, to be brought except by the party who had the immediate estate of inheritance, either in fee or in tail. Nor could any person maintain the action unless he had the inheritance vested in him at the time when the waste was committed (*g*). Upon a judgment against the defendant the plaintiff recovered the land wasted and treble damages (*h*). By whom it lay.

The remedy by this proceeding gradually fell into disuse; and the case of *The Governors of Harrow School v. Alderton* (*i*) has been mentioned as the only instance to be met with in modern times, until it was revived in the Modern instances of the action.

(*f*) As to the equitable construction of this statute, see the observations at the end of the case of *Eyston v. Studd*, Plowd. 467 a. See also Hatton on Statutes, cap. 5. The practice of construing statutes by equity, of which so much is said in the ancient law writers, was a necessary consequence of the brief and sententious manner in which the early statutes are framed. See further respecting a tenant for a less term than a year, being included under the term "tenants for years," in Serjt. Hill's notes to Vin. Ab. vol. 22, tit. Waste; Br. Ab. tit. Waste, pl. 52. In one case Lord Ellenborough refused to give a similar extension to the statute 4 Geo. 2, c. 28, which

specifies tenants for life, lives, or years, *Lloyd v. Rosbee*, 2 Camp. 453.

(*g*) 2 Inst. 303, 305; Co. Lit. 53 b; 2 Roll. Ab. tit. Waste, 833; Com. Dig. tit. Wast (C. 3); *id.* tit. Pleader (3 O. 18). As to an action of waste lying at common law by a tenant in tail, it should be observed, that it is the more common opinion that what is now an estate tail was a fee simple conditional before the statute *De Donis*.

(*h*) As to what is to be considered the "*locus vastatus*," see 2 Inst. 303, 304; Co. Lit. 53 b; Com. Dig. tit. Wast (F. 2). And see *id.* tit. Pleader (3 O. 22); Finch. bk. 1, 29; 2 Inst. *ubi sup.*

(*i*) 2 Bos. & Pul. 86.

Part II. — *case of Redfern v. Smith*. The Court, however, on both these occasions, distinctly recognized the ancient form of proceeding, and adopted some of the important principles of the old doctrine of waste. For, in the former case, they held that injuries of a very trivial kind did not amount to waste, and that if the jury found a verdict for the plaintiff, and gave only very small damages, the defendant was entitled to judgment (*k*); and in the latter case, they held that under the statute of Gloucester, the jury must always find the place wasted, and for a defect of the verdict in this particular, they granted a new trial (*l*).

*Action of case
in the nature
of waste.*

The old action by writ of waste having in modern times generally given way to another remedy, viz., an action on the case in the nature of waste, the former proceeding was at length abolished by 3 & 4 Will. 4, c. 27, s. 36. The action of case for waste is founded on the ancient form of proceeding, and is adapted to the redress of the same species of injuries to the freehold (*m*). The rule as to the necessity of proving real damage applies equally, therefore,

(*j*) 2 Bing. 262. And see *S. C.* on former trial, 1 Bing. 382.

(*k*) See *Doherty v. Allman*, 3 App. Cas. 709, where the question of ameliorating waste is considered; especially per Lord Blackburn, at p. 733. And see *Huntley v. Russell*, 13 Q. B. 572, 588.

(*l*) The reader, who is desirous to be more particularly acquainted with the nature of the proceeding by writ of waste will find it fully treated of in 2 Inst. 145, 299 *et seq.*; Co. Lit. 53 a; Fitz. N. B. tit. Writ of Waste; Com. Dig. tit. Wast; Bl. Com. vol.

2, p. 281, vol. 3, p. 223; Bul. N. P. 119 a; *Greene v. Cole*, 2 Wms. Saund. 252. It may be useful to caution the reader, that much confusion upon the subject of the ancient doctrine of waste has arisen from an inattention to the important distinctions between the several remedies at common law, under the statute of Marlebridge, and under the statute of Gloucester.

(*m*) The rights and liabilities remain as before, the remedy only being changed, *Bacon v. Smith*, 1 Q. B. 345; *Woodhouse v. Walker*, 5 Q. B. D. at p. 407.

to the modern form of action (*n*). The latter is a much more easy and expeditious remedy than the writ of waste, and is applicable to many cases where the former mode of proceeding altogether failed (*o*). Chap. I. s. 1.

An action for waste may, therefore, be resorted to in many instances for the purpose of determining whether the removal of articles annexed to the freehold is warranted by the law of fixtures or not. It is the appropriate remedy in such cases for the reversioner against a tenant in possession, whether for life or for years (*p*). The proceeding is founded on the injury occasioned to the plaintiff's reversionary interest by the wrongful act of the party in immediate possession of the land. And hence it would be inapplicable to all those cases in which an executor lays claim to remove articles, as fixtures, which have been put up by his testator, whose interest in the land is determined by his death; because, in such cases, there exists no privity of estate between the parties (*q*). When a remedy in cases of fixtures.

By 3 & 4 Will. 4, c. 42, s. 2, an action may now be maintained by the personal representative, for injuries to the real estate committed within six calendar months before the testator's death, provided such action is brought within a year after his decease (*r*). Action by executors.

(*n*) *Doherty v. Allman*, 3 App. Cas. 709, 733.

(*o*) As to the advantages of the action upon the case compared with the ancient writ of waste, see 2 Wms. Saund. 252, n. 7.

(*p*) In an early case it was said that if an under lessee takes planks, &c., fixed to the freehold, an action upon the case lies against him by the lessee, *West v. Trefusye*, W. Jones, 224. As to the liability in waste of a tenant for the acts of a stranger, see 2 Inst. 145,

303, 305; Vin. Ab. tit. Waste (K.); Doct. & Stud. Dial. 2, ch. 4; *Attersoll v. Stevens*, 1 Taunt. 183 *et seq.*

(*q*) See *Hitchman v. Walton*, 4 M. & W. 409; *Bacon v. Smith*, 1 Q. B. 345.

(*r*) An action lies also by a personal representative for injuries to the fixtures of the deceased whereby the personal estate is diminished, *Barnett v. Lucas*, Ir. R., 6 C. L. 247. And see *Hone v. Hamilton*, Ir. R., 9 C. L. 15.

Part II.

Liability of
executors for
waste.

An action of waste could not be maintained against the personal representative for waste committed by the testator in his lifetime; because waste is a tort, which in the language of the law "*moritur cum personâ*" (*t*). However, the executors and administrators of a tenant for years are punishable for waste committed by them while they are in possession of the land (*u*). And if, by the commission of waste by a testator, his personal estate has been benefited, his executors will be chargeable for it to the value of the property, although not in this form of action (*v*). Moreover, by the above-mentioned statute, an action is given against the personal representative for injuries committed by the testator to the real estate of another within six calendar months previous to the testator's death, provided the action is brought within six calendar months after the personal representative has taken upon himself the administration. In the case of a continuing injury in the nature of permissive waste, as this is a continuing wrong giving a cause of action *de die in diem* up to the death of the testator, the period of limitation for bringing the action runs from the death of the testator (*w*).

Whether
action lies
where there is
covenant to
repair.

In respect of the parties between whom this action is maintainable, it has been held that the right to support the action will not be waived by entering into any special covenant, such as not to do waste, &c.; but that the reversioner will have his election either to bring an action upon the case in tort for the waste, or an action upon the special

(*t*) 2 Inst. 302; Vin. Ab. tit. Waste (S. 2).

(*u*) 1 Cru. Dig. tit. 8, ch. 2, § 11.

(*v*) *Powell v. Rees*, 7 A. & E. 426; *Hambly v. Trott*, Cowp. 376; *Bishop of Winchester v. Knight*, 1 P. Wms. 407; *Garth v. Cotton*, Dick. at p. 215.

(*w*) *Woodhouse v. Walker*, 5 Q. B. D. 404, 408. But where an action is commenced against a testator in his lifetime in respect of acts not of a continuing nature, and he dies more than six months after the commencement of the action, no action lies against his executors, *Kirk v. Todd*, 21 Ch. D. 484.

covenant. In *Kinlyside v. Thornton* (x), a lessee covenanted to yield up the demised premises, with their appurtenances, at the end of the term. During the term waste had been committed in pulling down and demolishing certain articles described in the declaration as an ale-house bar, and divers doors, partitions, dressers, &c., part of the premises. The plaintiff, after the expiration of the term, brought an action of case in nature of waste; and upon an objection that he ought to have sued on the covenant, the Court were of opinion, that an action on the case was maintainable as well as covenant; for it was said by De Grey, C. J. that the landlord, by acquiring a new remedy by the special covenant, did not therefore lose his old (y).

The authority of this decision has, however, been supposed to be impeached by some later cases. In *Jones v. Hill* (z), the plaintiff declared in an action of case in nature of waste, against a lessee who had entered into a special covenant to repair. And according to the report of the case in 1 Moore (C. P.), 100, Gibbs, C. J., in delivering judgment, observed, that “when there is an express stipulation or contract between two parties, this species of action is not maintainable; for such contract is a total waiver of tort, and it therefore ceases to bear the character of waste.” But it is to be observed of this case, that in the report given of it in Taunton, the *dictum* attributed to Gibbs, C. J., is wholly omitted. Indeed, the decision itself turned upon a particular point, which did not involve the general question, viz., that the injury complained of by

(x) 2 W. Bl. 1111.

(y) See 2 Wms. Saund. 252 b. In *Elwes v. Maw*, 3 East, 38, the plaintiff declared in an action of case in nature of waste, yet it appears that the tenant held under a lease in which there was a special covenant to repair. A cove-

nant to repair does not preclude an injunction in equity for waste, *Goodeson v. Gallatin*, Dick. 455; *Mayor of London v. Hedger*, 18 Ves. 455; *Kimpton v. Eve*, 2 Ves. & Bea. 349; and *post*, p. 364.

(z) 7 Taunt. 392.

Part II.

the plaintiff could not in any view be considered to amount to an act of waste. And this is the construction put upon the case in *Burnett v. Lynch* (a), where the authority of *Kinlyside v. Thornton* is supported by the Court.

There is also another case, *Herne v. Benbow* (b), which has been thought to be at variance with the decision of *Kinlyside v. Thornton*; and is considered to be an authority against an action on the case being maintainable where an *assumpsit* is to be implied between a landlord and tenant (c). On referring, however, to this case, the determination appears to have proceeded altogether upon a different principle, viz., that an action on the case is not maintainable for *permissive waste* (d). Moreover, in *Marker v. Kenrick* (e), the Court of Common Pleas unanimously followed the case of *Kinlyside v. Thornton*, holding that an action on the case in the nature of waste would lie, as well as an action for breach of a covenant contained in a lease.

(a) 5 B & C. at p. 603.

(b) 4 Taunt. 764.

(c) See Harg. Co. Lit. 54 b, N. 359; *Leslie v. Wilson*, 3 Brod. & Bing. 171; *Torriano v. Young*, 6 C. & P. 8, 11.

(d) With respect to the question whether an action for permissive waste can be supported, see Appendix (G.).

(e) 13 C. B. 188.

SECTION II.

Of Injunctions, &c., for Waste in the case of Fixtures.

THE proceedings hitherto described are remedies of a corrective nature; and they are, in reality, methods of recovering a compensation for injuries already sustained, and for which the party aggrieved can, in general, only receive satisfaction by pecuniary damages (*a*). But it frequently happens that the consequences attending injuries to real property are of such a nature, that the damages recoverable in an action are a very inadequate compensation for the loss incurred. The Court of Chancery formerly provided a very beneficial remedy in these cases, whereby injuries to real property might be anticipated and prevented. This equitable interposition consisted in restraining a person from committing waste, either threatened, or which he might be in the act of committing, by means of a writ of injunction, which was a prohibitory writ, issuing by the order and under the seal of a Court of Equity. Prior to the Common Law Procedure Act, 1854, the Courts of law had no power to grant an injunction (*b*), but by that Act (*c*), power was given them to grant an injunction in cases where an injury had actually been committed, and the party injured had brought an action. But now, by the Judicature Act, 1873 (*d*), all acts which a Common Law Court or a Court of Equity only could formerly restrain by injunction, can now be restrained

Chap. I. s. 2.

Court of
Chancery
formerly
interfered
by writ of
injunction.

(*a*) By the old writ of waste in the *tenet*, the place wasted was recovered.

(*b*) As to the old common law methods of restraining waste by prohibition and writs of estrepement of waste, see

Jefferson v. Bishop of Durham,
1 Bos. & Pul. at pp. 108, 121.

(*c*) 17 & 18 Vict. c. 125,
ss. 79—82.

(*d*) 36 & 37 Vict. c. 66, s. 25,
sub-s. 8. And see Ord. L.
rr. 3, 6, 11, 12 (R. S. C. 1883).

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**Power of
High Court
to grant
injunction.**

by either of the divisions of the High Court of Justice; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does, or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable (*e*).

It has been seen that the right to fixtures is frequently decided upon questions of waste. And as the remedy by injunction is calculated to afford very prompt and effectual protection in cases where injury to this species of property is apprehended, or might be sustained, it will be useful to consider shortly the nature and application of the proceeding (*f*).

**In what cases
injunction
lies.**

There are a great variety of cases in which the Court will thus interfere. The most ordinary occasion, however, is to restrain a tenant for life, or tenant for years, upon the application of the owner of the inheritance. And an injunction may be obtained on the application of a remainder-man for life, as well as on that of a remainder-man in fee, notwithstanding there is an intermediate estate for life (*g*). Formerly, the Court of Chancery in some

(*e*) See the jurisdiction of the High Court to grant injunctions considered in *Beddow v. Beddow*, 9 Ch. D. 89; *Aslatt v. Southampton*, 16 Ch. D. 143; *Quartz Hill, &c. Mining Co. v. Beall*, 20 Ch. D. 501; *The North London R. Co. v. G. N. R. Co.*, 11 Q. B. D. 30.

(*f*) It would be unneces-

sary for the present purpose to enter into a detail of the various cases in which the remedy by injunction applies. The reader will find them specified in Com. Dig. tit. Chancery (D. 11); Eden on Injunctions; and Kerr on Injunctions.

(*g*) 1 Eq. Cas. Ab. 399; *Bewick v. Whitfield*, 3 P. Wms.

cases restrained a person even where he was dispunishable of waste, either from the nature of his estate, or by express grant "without impeachment of waste," and it is now expressly provided by the Judicature Act, 1873 (*h*), that an estate for life without impeachment of waste shall not be deemed to confer any legal right to commit equitable waste, unless a contrary intent appears from the instrument creating the estate (*i*). Chap. I. s. 2.

If waste has already been committed, the Court will at the same time that it enjoins from further waste, also grant an account, and decree satisfaction for waste which has been actually done (*k*). But, on the other hand, the Court will not grant an injunction against that which, though it is technically waste, is what is called "ameliorating waste" (*l*). Account of waste committed.

The relief by injunction will not be granted on slight or uncertain grounds; for it is not sufficient that the plaintiff apprehends, or has been informed, that the defendant intends to commit waste; but there must appear an actual waste, or some act from which the intention is fully evinced, as sending a surveyor to mark out trees, &c. (*m*). Threats, however, will form a sufficient ground for an injunction; for it is not necessary to stay till waste is actually What a sufficient ground for injunction.

268, n. (F); *Farrant v. Lee*, Amb. 105, n. (2); *Perrot v. Perrot*, 3 Atk. 94.

(*h*) 36 & 37 Vict. c. 66, s. 25, sub-s. 3.

(*i*) See *Baker v. Sebright*, 13 Ch.D. 179, and *ante*, p. 188, *in notis*.

(*k*) *Jesus Coll. v. Bloom*, 3 Atk. 262; *S. C.* Amb. 54; *Doherty v. Allman*, 3 App. Cas. at p. 722, per Lord Cairns, C. But the general rule in the Court of Chancery was—no injunction, no account, *Jesus*

Coll. v. Bloom, supra; *Parrott v. Palmer*, 3 My. & K. 632, 640.

(*l*) *Doherty v. Allman*, 3 App. Cas. 709.

(*m*) *Gibson v. Smith*, 2 Atk. 182; *Jackson v. Cator*, 5 Ves. 688; *Hanson v. Gardiner*, 7 Ves. 307; *Etches v. Lance, id.* 417; *Earl of Ripon v. Hobart*, 3 My. & K. 169; *Dunn v. Bryan*, 7 Ir. R., Eq. 143, 158. And see Kerr on Injunctions (2nd ed.), p. 14.

Part II.

done (n). And in like manner, an injunction has been granted against a tenant for life who insisted on a right to commit waste where he had none, although no waste was in fact committed (o).

Injunction to restrain the removal of things fixed to the freehold.

From the view here given of the nature of the proceeding by injunction, it appears that it is a remedy which may frequently be adopted by the reversioner for the purpose of restraining a tenant for life, or for years, who intends, or rather threatens, to sever things from the freehold under a claim arising out of the law of fixtures. It seems, indeed, to be more particularly applicable, where a tenant at the expiration of his term insists on a right of taking away substantial buildings which the owner of the land contends are not within the privilege of removal.

Until determination of right.

Thus, in one case, an injunction was granted by the Vice-Chancellor of England against the assignees of a bankrupt lessee, to restrain them from selling a steam-engine and building, or removing them from the premises, until the claim in dispute was determined at law. In this case a lease was granted to the bankrupt of a mill, buildings, and steam-engine; in which lease he covenanted to repair the premises and steam-engine, and to leave them in repair at the end of the term, reasonable wear and tear excepted. It appeared that during the term the lessee had erected a warehouse, part of the foundation of which was placed upon an old building, and had removed all the works of the engine, except the fly-wheel, shaft, &c., and had attached to them a new engine of greater power. The Vice-Chancellor was of opinion that although, if the engine had been worn out by wear and tear, the lessee would have been under no

(n) *Gibson v. Smith, supra*; *Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 706; *Packington v. Packington*, Dick. 101; *Barry v. Barry*, 1 Jac. & W. at p. 651.

And see *Hext v. Gill*, L. R., 7 Ch. 699; *Lord Cowley v. Byas*, 5 Ch. D. at p. 950.

(o) *Gibson v. Smith, supra*; *S. C. Barnard*. Ch. R. at p. 497.

obligation to repair it; yet, having taken away the existing engine and substituted another for it, the latter was subject to the same stipulations in the lease as the old engine, and that it could not therefore be removed. His Honour also said that the new building must be protected by the same covenant as protected the old one. Accordingly, he granted an injunction against the assignees to prevent the removal of either the engine or the building, subject to an action to be brought by the lessors to try the right (*p*).

Chap. I. s. 2.

Again, it seems that the Court will grant an injunction to restrain a sheriff from proceeding to sell fixtures to which the landlord is entitled, under an execution against a tenant in possession (*q*). In granting an injunction in a case of this description Lord Romilly, M. R., said, "I am of opinion that if the sheriff takes part of the fixtures belonging to the landlord, this Court will interfere to prevent him, without the mere statement of its being an irreparable damage. The mere fact of removing the landlord's fixtures is in itself an irreparable damage. It is waste which is committed upon the property, and this Court will interfere to prevent it" (*r*).

Injunction to restrain sale under execution against tenant.

But, in all these cases, to entitle a party to relief by injunction on the specific ground of waste, it must appear that the property in dispute is actually affixed to the freehold. For, where a bill was brought praying an injunction and account, which stated that the defendant had committed waste, by destroying a dove-cote, and by removing the locks from the doors of the house, the chains

Property must be actually affixed.

(*p*) *Sunderland v. Newton*, 3 Sim. 450. That a tenant is not entitled to remove substantial buildings, see *ante*, p. 62. As to the mode of deciding the right to fixtures on injunction, see *Hooper v.*

Broderick, 9 L. J., Eq. 321.

(*q*) *Richardson v. Ardley*, 38 L. J., Ch. 508. Compare *Jackson v. Stanhope*, 15 L. J. Ch. 446.

(*r*) *Richardson v. Ardley* *supra*.

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from the lawn, the statues, images, and fences from the pleasure-ground, wardrobes, presses, and closets, forming part of the wainscot of the house, Lord Eldon, in giving his judgment, said, "The foundation of this motion to revive the injunction is, first, a clear act of waste; secondly, another act, removing things supposed to be fixed to the freehold, wainscot, presses, &c. . . . As to the dove-cote, a clear act of waste is proved; therefore against waste the injunction must be revived: but I cannot grant it against removing the presses, *eo nomine*, if not fixed to the freehold" (s).

Injunction to prevent breach of covenant, &c.

Besides the specific remedy by means of injunction to stay waste, as above described, it appears that there are a variety of other methods by which the right to fixtures may be incidentally determined. For instance, by means of an injunction to restrain a breach of covenant (t); or upon a decree for an account, &c. And from a reference to several of the cases detailed in the former part of this work, it will be seen that many important questions relating to the law of fixtures arose in proceedings instituted in the Equity Courts (u).

Prohibition against ecclesiastical persons.

The liability of ecclesiastical persons for waste has been explained on a former occasion (x). And with respect to the remedy in such cases, it is to be observed, that besides

(s) *Kimpton v. Eve*, 2 Ves. & Bea. 349; and see *Earl of Bedford v. Smith*, 2 Dy. 108 b; *Shirreff v. Barnard*, 8 Sim. 161.

(t) See *Doherty v. Allman*, 3 App. Cas., pp. 718—721, per Lord Cairns, C.; and see Kerr on Injunctions (2nd ed.), p. 384 *et seq.*

(u) See *Lawton v. Lawton*, 3 Atk. 13, where the right to fixtures between the executor of tenant for life and the re-

mainder-man was determined on a bill by a creditor of the deceased tenant for life. So, in *Lord Dudley v. Lord Warde*, Amb. 113, a bill in equity was filed by the executor of a tenant for life against the remainder-man, to have fire-engines delivered up as a part of the personalty. See, too, *D'Eyncourt v. Gregory*, L. R., 3 Eq. 382; *Boyd v. Shorrocks*, L. R., 5 Eq. 72.

(x) See *ante*, p. 191 *et seq.*

an action by the successor, either in the Spiritual Court, or in the Courts of Common Law, to recover damages for waste already committed, it seems that the Court of Chancery had jurisdiction to issue a writ of prohibition of waste, to restrain such persons from committing waste in their ecclesiastical possessions (*y*). And by analogy to this proceeding, the Courts of Equity frequently interfered by injunction; as, for instance, against a rector at the suit of the patron (*z*). And so an injunction was in one case granted to stay waste, against the widow of a rector at the suit of the patroness during a vacancy (*a*). It seems, also, that bishops, deans, and chapters, may be restrained by injunction at the suit of the Crown (*b*). As has been stated at a former page (*c*), the High Court of Justice has now jurisdiction over all acts, which either the Court of Chancery or the Common Law Courts formerly restrained by injunction.

(*y*) 2 Roll. Ab. tit. Wast. p. 813. And see the case of *Jefferson v. The Bishop of Durham*, 1 Bos. & Pul. 105. See, also, 2 Burn's Eccl. Law, tit. Dilapidations; 1 Cru. Dig. tit. 3, ch. 2, § 74; *Bishop of Winchester v. Wolgar*, 3 Swanst. 493, n.; *Acland v. Attwell*, *id.* 499, n. A very learned account of the introduction of the writ of prohibition of waste will be found in *Jefferson v. The Bishop of Durham*, *supra*; in which case it was determined, after much discussion, that the Court of Common Pleas had no power to issue an original writ of prohibition to restrain a bishop

from committing waste in the possessions of his see, at least at the suit of an uninterested person; and it was doubted whether the Court of King's Bench had such a power.

(*z*) *Strachy v. Francis*, 2 Atk. 217; *S. C. sub nom., Bradly v. Strachy*, Barnard. Ch. R. 399; *Knight v. Moseley*, Amb. 176; *Jefferson v. Bishop of Durham*, 1 Bos. & Pul. at p. 119; *Sowerby v. Fryer*, L. R., 8 Eq. 417.

(*a*) *Hoskins v. Featherstone*, 2 Br. Ch. Cas. 552.

(*b*) *Knight v. Moseley*, Amb. 176; *Wither v. Dean, &c., of Winchester*, 2 Mer. at n. 427

(*c*) *Ante*,

SECTION III.

Of other Remedies by Action in respect of Fixtures.

OF TRESPASS.

Part II.

Trespass to
fixtures, be-
fore and after
severance.

FIXTURES, as constituting in their nature a part of the land while in a state of annexation, are subject to the general rules which govern an action of trespass in its application to injuries to real property. And when severed from the freehold, and after their personal nature is revived, they may properly be sued for in an action of trespass to goods (*de bonis asportatis*).

Trespass *quare
clausum fregit*
for fixtures.

Thus, upon the same principle that in trespass for an injury to land, it is essential that the plaintiff should have actual possession of the land at the time of the act complained of, a landlord cannot, during a subsisting term, support trespass *quare clausum fregit* against a stranger for the removal of fixtures attached to his freehold. In the case of the tenant, however, this would be the proper form of action in which he might recover compensation for the like injury (a). So, where a tenant, under colour of the law of fixtures, wrongfully severs from the freehold articles put up by himself during the term, or which have been demised to him together with the premises, the landlord cannot, pending the term, support an action against

Landlord
pending term.

(a) As to analogous cases of trespass for cutting down trees, see *Herlakenden's case*, 4 Co. 63 a; Br. Ab. tit. Trespass, pl. 273; Com. Dig. tit. Trespass (A., & B.); *id.* tit. Trespass (H.); Vin. Ab. tit. Tres-

pass (S.); *Gordon v. Harper*, 7 T. R. 9; *Blackett v. Lowes*, 2 M. & S. at p. 499; *Pomfret v. Ricroft*, 1 Wms. Saund. 322, n. 5. And see *Davies v. Connop*, 1 Price, 53.

him as for trespass to real property (b). For the same reason, and because in respect of real property there is no constructive possession, the heir could not, till after entry, try the question with the executor, whether articles descend with the inheritance or are properly fixtures, in an action of trespass *quare clausum fregit*. After entry, however, this would be the proper form of proceeding (c); and upon entry there is a relation back from the time of actual entry to the time of the legal right to enter (d).

Chap. I. s. 3.

Heir before entry.

But, where fixed articles have been severed from the freehold and so reduced to a chattel state, the party in whom the right of property is vested from the time of severance, may support trespass *de bonis asportatis* for the removal; because the general property of personal chattels draws to it the legal possession. The reversioner may, therefore, sustain this action against a tenant in possession pending a lease, for the removal of things which the tenant, either from the circumstance of their having been demised to him, or for any other reason, has no right to sever and take away (e). And so a tenant, although the property in fixed articles may belong to the landlord by the terms of the demise or otherwise, may maintain this action against a stranger who wrongfully removes

Trespass *de bonis asportatis* for fixtures.

(b) See *Hitchman v. Walton*, 4 M. & W. 409. It seems that trespass would lie in such a case against a strict tenant at will, because it is said his term is put an end to by the severance. See Yr. Bks. 8 Edw. 4, p. 6, 12 Edw. 4, p. 8; Co. Lit. 57 a; *Walgrave v. Somerset*, Saville, 84; *Lord Mountegle v. Lady Worcester*, Dy. 121 b.

(c) *Anon.*, 2 Mod. 7.

(d) *Barnett v. Earl of Guildford*, 11 Exch. 19.

(e) For this principle, see *Lewis Bowles' case*, 11 Co. 81 b; *Udal v. Udal*, Aleyn, at p. 82, post, p. 370; *Evans v. Evans*, 2 Camp. 491; *Ward v. Andrews*, 2 Chit. 636. And see *Berry v. Heard*, as cited in 20 Vin. Ab. tit. Trespass (S.), pl. 10 (as to which see Serjt.

Part II. them; for during the term he has a special property therein (*f*).

Right of
tenant after
severance of
articles to
which he is
not entitled.

It would seem, that a tenant, after the severance of articles to which he is not entitled as fixtures, could not, in general, maintain trespass against his landlord for removing them. In one case (*g*), indeed, an action of trespass was brought by a tenant against the bailiffs of his landlord, for removing certain fixed articles which it appeared had been demised to him together with the house, and for which he recovered damages. But no objection as to the form of action, with reference to the plaintiff's interest, seems to have been taken on that occasion (*h*); and it may be observed, moreover, that the articles in question had been wrongfully severed under the authority of the landlord himself; and it might, therefore, be considered, that the landlord and the defendants who acted under him were estopped from insisting that the tenant's interest was put an end to by the severance (*i*).

(*f*) See *Hitchman v. Walton*, 4 M. & W. 409; and per Parke, B., in *Boydell v. M'Michael*, 1 Cr. M. & R. 177, 179. In *Evans v. Evans*, 2 Camp. 491, Littledale, J., was of a contrary opinion.

(*g*) *Pitt v. Shew*, 4 B. & Ald. 206.

(*h*) This case was prior to that of *Farrant v. Thompson*, 5 B. & Ald. 826, in which it was clearly laid down that the property of fixed articles demised with the premises, reverted to the landlord on severance, *post*, p. 379.

(*i*) In the case of *trees*, it has been held that, where pollards are not excepted in a demise, and the tenant would be entitled to them if blown

down, and has the usufruct in them during the term, the lessor cannot by wrongfully severing them acquire a right to them; and the tenant may maintain an action against him for the wrongful cutting, *Channon v. Patch*, 5 B. & C. 897. And see *Berriman v. Peacock*, 9 Bing. 384; notes to *Pomfret v. Ricroft*, 1 Wms. Saund. 322 (ed. 1871, p. 566). As regards copyhold estates, the property in the timber is in the lord, but if a stranger cuts down the trees the copyholder can maintain trespass against him, as also against the lord if he does so, *Eardley v. Granville*, 3 Ch. D. at p. 832, per Jessel, M. R.

An auctioneer who is put into possession of a house for the purpose of selling fixtures therein, cannot be considered to have such a possession of the house and fixtures as would entitle him to maintain an action of trespass for injury to the house, nor can he maintain an action *de bonis asportatis* for the fixtures, when the fixtures were to be sold whilst unsevered and to be detached and removed by the purchaser. For in such a case he has no possession of fixtures as chattels, and is only authorized to sell the right of removing them (*j*).

Chap. I. s. 3.

Right of auctioneer to maintain trespass for fixtures.

It may be collected from the foregoing remarks that the right to bring an action of trespass *de bonis asportatis* for chattels which have been disannexed from the freehold, and to bring trespass *quare clausum fregit* for injuries to them previous to the act of severance, will frequently reside in different individuals. And this proposition may be illustrated by the case of *Harrison v. Parker* (*k*). In that case a person had, at his own expense, erected a bridge on the soil of another with his permission; part of the bridge having been pulled down, and the materials taken away by a wrong doer, it was held, that the original owner might maintain trespass for the asportation, because the exclusive right of property in the materials reverted to him by the act of severance. But it appears from the observations of Lord Ellenborough, C.J., that the case would have involved a different question, if the only injury complained of had been to the materials while in a state of annexation. In that case it would seem that the right of action would have been in the owner of the soil.

Right to bring trespass, before and after severance.

It may be questionable whether an action of trespass *de bonis asportatis* for the removal of fixtures after their

Severance and asportation one continued act.

(*j*) *Davis v. Danks*, 3 Exch. 435. 8 Taunt. 602. And compare *Dyson v. Collick*, 5 B. & Ald. 600.

(*k*) 6 East, 154. See also *Duke of Newcastle v. Clark*,

Part II.

severance, could have been maintained in a case where the severance and removal were one continued and entire act. In the case of *Udal v. Udal* (*l*), it is said, that the Court agreed, that, “if lessee for years cut down timber “ trees and lets them lye, and after carries them away, so “ that the taking and carrying away be not as one con- “ tinued act, but that there be some time for the distinct “ property of a divided chatle to settle in the lessor, that “ an action of trespass *vi et armis* would lye in such case “ against the lessee. And that in such case felony might be “ committed of them, but not where they were taken and “ carried away at the same time.” If the principle contained in this passage be correct, it would seem to apply equally to the case of fixtures (*m*). The question, however, does not appear to have undergone much discussion (*n*), and is not, it is thought, of much practical importance at the present day (*o*).

Pleading,
description of
fixtures in.

With reference to the form of pleading in actions of trespass for injuries to fixtures,—it may be observed that it will be well to give an appropriate description to the property in question. And where the subject matter of complaint arises whilst it is in a state of annexation to the freehold, it is advisable, in order to meet objections upon this point, to describe the property in terms applicable to it in a fixed state, for, as we have seen, they do not fall within the general description “goods and chattels” (*p*).

(*l*) Al. at p. 82.

(*m*) And see the position as laid down in Bul. N. P. 84. See also Vin. Ab. tit. Trees (A.), (G.); Com. Dig. tit. Biens (H.); 2 Roll. Ab. tit. Moeresme, 119.

(*n*) Vide *Spooner v. Brewster*, 3 Bing. 136; *Ward v. Andrews*, 2 Chit. 636; *Wheeler v. Montefiore*, 2 Q. B. 133.

(*o*) The reader will find

some further remarks upon it in the ensuing division respecting the action of trover, to which the authorities more immediately relate, *post*, p. 375.

(*p*) See, however, *Barnett v. Lucas*, Ir. R., 6 C. L. 247, 255, and *post*, p. 374. As to amendment of pleadings, see Ord. XXVIII. (R. S. C., 1883). As to user of fixtures being

As regards the damages which are recoverable in an action of trespass in relation to fixtures, the case of *Thompson v. Pettitt* (q) may be referred to. This was an action of trespass for taking fixtures, stoves, blinds, &c. The plaintiff was a mortgagee of a house and tenant's fixtures, by deposit of the lease accompanied by a memorandum; and one of the defendants, as assignee under the bankruptcy of the mortgagor, had caused the fixtures to be sold by auction by the other defendant, who was an auctioneer, when they realized the sum of 36*l.* 16*s.*, which was their fair value if sold in that manner. The plaintiff obtained a verdict, with damages 80*l.*, the proved value of the fixtures between incoming and outgoing tenant. The Court refused to reduce the damages to 36*l.* 16*s.*; and Lord Denman, C. J., said that the defendants were not entitled to presume that the plaintiff would not have sold the fixtures to the eventual purchaser of the term, and that he was, therefore, entitled to claim the full value which he would have realized if he had sold in that manner.

TROVER OR CONVERSION.

Where fixtures have been unlawfully severed from the freehold and carried away, an action of conversion, or trover, may be brought to recover their value. The mere act of severance, however, is not a sufficient ground for sustaining the action; there must be a subsequent asportation, or some unlawful assumption of property to make the conversion, which is the gist of the action (r).

Trover lies for fixtures severed.

evidence to support an action of trespass, see per Crowder, J., in argument in *London & Westminster Loan, &c. Co. v. Drake*, 6 C. B. (N. S.) at p. 800, and see *post*, p. 378.

(q) 10 Q. B. 101. Compare *London and Westminster Loan, &c. Co. v. Drake*, 6 C. B. (N. S.)

798, and cases noted *post*, p. 381, note (x).

(r) Bac. Ab. tit. Trover (B). And see *Mires v. Solebay*, 2 Mod. at p. 245; Bul. N. P. (7th ed.), 44 b. See also *Longstaff v. Meagoe*, 2 A. & E. 167; *Simmons v. Lillystone*, 8 Exch. at p. 442.

Part II.

But not whilst
they remain
annexed.

But as trover is not maintainable, except for the conversion of personal chattels, this action cannot be brought for the recovery of fixtures so long as they are annexed to and remain parcel of the realty. Thus in *Lee v. Risdon* (s), Gibbs, C. J., observed that it never was heard of that trover could be brought by a tenant for his fixtures remaining unsevered at the expiration of his term. So also, in the case of *Davis v. Jones* (t), where it was held that trover would lie for certain jibs, which were detached pieces belonging to some fixed machinery, the ground upon which the action was sustained was, that these articles might be considered, from their nature and construction, to be mere moveable chattels. And Abbott, C. J. said that if the jibs were to be considered as annexed to and parcel of the freehold, then, admitting that the plaintiffs might have removed them during the term, as being erections for the benefit of trade, yet they could not after the term maintain trover for them, because the action of trover was maintainable in respect of personal chattels only (u).

*Minshall v.
Lloyd.*

The same principle governed the decision of *Minshall v. Lloyd* (v), in which trover was brought for certain steam engines, and other fixed machinery of a colliery. A lessee while in possession of the premises erected the machinery, and having forfeited his interest during the term, the lessor obtained possession under a proviso for re-entry. Afterwards the machinery was seized under a *fi. fa.* at the suit of an execution creditor, and trover was brought for it against the sheriff by certain trustees claiming under an assignment made prior to the lessor's re-entry. The decision of the case turned upon the principle

(s) 7 Taunt. at p. 191.

(t) 2 B. & Ald. 165. As to this case, see *ante*, Chap. I. p. 9.

(u) And see *Colegrave v. Dias Santos*, 2 B. & C. at p. 79, per Abbott, C. J.; *Wood v. Smith*, Cro. Jac. 129.

(v) 2 M. & W. 450.

that the right of the tenant having determined while the articles continued fixed, he could not maintain an action of trover for them as goods and chattels (*w*). So neither could parties claiming under him by the assignment recover in trover, as the machinery was never goods and chattels at all, so as to pass to them; and they had no greater right than the tenant himself, which was only that of removing the property during the term. In conformity with the same rule, and on the authority of the case last mentioned, it was held, on a subsequent occasion, that even during the term a tenant cannot maintain trover for fixtures which remained unsevered when the action was brought (*x*); and, of course, if he leaves them unsevered upon quitting possession on the expiration of his tenancy, he cannot maintain this action against the incoming tenant (*y*).

We have seen that an erection, though of great weight, may be so constructed as to be a chattel, as in *Wansbrough v. Maton* (*z*), where an action of trover was brought for a barn. This barn appeared to be a wooden building erected on a foundation of brick and stone; the superstructure of the barn rested by its own weight alone upon certain stone staddles or blocks, and in part on a foundation of brickwork; both the stones and the brick foundation were let into the ground, but the barn was not attached to them either with mortar or otherwise. It was held that an action of trover would lie for a barn so constructed; because not being united to the freehold it was not part of it, and no fixture at all (*a*).

Trover lies if erection a mere chattel.

(*w*) See *Leader v. Homewood*, 5 C. B. (N. S.) 546.

(*x*) *Mackintosh v. Trotter*, 3 M. & W. 184. See also *Lyde v. Russell*, 1 B. & Ad. 394, in which case a tenant on quitting the premises left his fixtures, and although they were afterwards severed by

the landlord, it was held that the tenant could not maintain trover for them.

(*y*) *Wilde v. Wa.* B. 637; *Roffey v. I* 17 Q. B. 574.

(*z*) 4 A. & E. 6 Chap. I. p. 4.

(*a*) In 11 Vin. At

Part II.

Term "fix-
tures" in
pleading.

In trover, it will not be intended that the property in demand is connected with the freehold, unless that fact expressly appears (*b*). Nor does the term "fixtures," in pleading, necessarily mean things affixed to the freehold. For where a declaration in trover was for certain goods, chattels, and *fixtures*, to wit, beds, &c., stoves, ranges, shelves, grates, closets, cupboards, and ovens, it was held that the term fixtures did not necessarily mean things affixed to the freehold, but might and should *after verdict* receive an interpretation which would support the declaration. And *per* Parke B., "the objection is, that, the damages having been assessed generally on the whole record, the judgment ought to be arrested, on the ground that a part of the subject matter of the action, viz. the fixtures, was such as could not be made the subject of an action of trover. . . . If it had clearly appeared that the plaintiff meant to sue in respect of 'fixtures' properly so called—things affixed to the freehold—the declaration would be bad after the assessment of general damages; but after verdict, we ought to make

cutors, 154, it is said that a granary built on pillars in Hampshire, is, by custom, a chattel which goes to the executors, and may be recovered in trover.

(*b*) *Wood v. Smith*, Cro. Jac. 129; Com. Dig. tit. Action on the Case, Trover (G. 1). See also *Earl of Bedford v. Smith*, 2 Dy. 108 b; *Kimpton v. Eve*, 2 Ves. & Bea. 349. And see the principle upon which the case of *Niblet v. Smith*, 4 T. R. 504, was decided. It was said in *Pyot v. Lady St. John*, Cro. Jac. 329, of shelves in a house, that they shall be intended fixed. So, of racks in a stable, *Anon.*, 2 Vent. 214. As to the latter, see

Wilde v. Waters, 16 C. B. 637. That trover lies for trees planted in boxes in a garden, see *Oliver v. Vernon*, 6 Mod. 170. It will have been observed, that several of the most important early questions respecting fixtures have, in fact, been determined in actions of trover; as in the instance of the cider-mill before Chief Baron Comyns; the hangings and tapestry in *Harvey v. Harvey*; and the saltpans in *Lawton v. Salmon*; see *ante*, pp. 217, 221, 244. It does not distinctly appear whether the property in these cases had been separated from the land before the commencement of the actions.

"every reasonable intendment in favour of the declaration" (c). Chap. I. s. 3.

Although trover does not lie for fixtures whilst they are annexed to the freehold, an action may be maintained for preventing a person from exercising his right to sever them. Thus in *The London and Westminster Loan, &c., Co. v. Drake* (d), the plaintiffs were the grantees under a bill of sale of tenant's fixtures, and subsequently to such bill of sale the grantor, the tenant, surrendered his interest to his landlord. Thereupon the landlord granted a fresh lease to the defendant, who refused to deliver up to the plaintiffs the fixtures, which remained unsevered. The Court held that such an action was maintainable.

Action lies for preventing exercise of right to sever.

From the nature of the action of trover as applied to the subject of fixtures, a question arises, whether this action could be supported, if the severing and carrying away of the article is one continued and entire act? There does not appear to be any case in which this question has been discussed with reference to the doctrine of fixtures; but it seems to have arisen incidentally in respect of the cutting down and carrying away of timber. In Rolle's

Whether trover lies where the severance and asportation are one continued act.

(c) *Sheen v. Rickie*, 5 M. & W. 175. This case was followed in *Barnett v. Lucas*, Ir. R., 6 O. L. 247, 255, where the plaintiff sued for injuries to personal chattels, and it was held in the Irish Court of Exchequer Chamber, that he was entitled to retain a verdict in respect of injuries to trade fixtures. The ruling in these cases would seem to be clearly applicable now, notwithstanding the change in procedure. It seems that an equally wide construction may sometimes be given to

the term *fixtures* in a conveyance. Thus, in *Wiltshier v. Cottrell*, 1 E. & B. 674, the Court of Queen's Bench held that a granary, which they found to be a mere chattel, might pass under this term, considering the length of time it had been put up, and the fact that it had always been demised with the freehold,

Part II*Berry v.
Herd.*

~~Assignment~~ . . . It is said that if lessee for life or years cut timber trees and immediately barks them and carries them away, yet they belong to the lessor who has the inheritance: for they are parcel of the inheritance; and the lessor may have trover and conversion for them, although he never seizes them before the carrying them away, and that the lessee carried them away immediately after the felling and barking, so that all was but one entire act. This is said to have been adjudged between *Berry* and *Herd*, upon a special verdict. This case is found in several of the books of reports, and is stated in a manner somewhat differently in each of them (f). It established a principle which had been for a long time doubted; viz., that a landlord has such a possession of timber cut down during the continuance of a lease, that he could maintain trover for it; because the lessee had only an interest in it while it was growing, which determined the instant it was cut down. This was in fact the principal question raised in the case, and the observations of the Court are for the most part applied to this point. It appears, however, from a reference to the case, that the Court did also take into consideration the objection as to the cutting and carrying away of the trees being one continued act. For they advert to the rule of the common law, that in criminal cases such a taking would be no felony; and, according to the report of the case in *Palmer*, Doderidge, J., is said to have remarked, that in respect of the barking of the tree, there must have been an interval between it and the cutting down of the tree (g).

Udal v. Udal.

There is another case, *Udal v. Udal* (h), in which the same point arose, and which has been mentioned on a former occasion. In the discussion of that case, it is said to have

(e) Vol. II., tit. Moeresme, 242.
p. 119.

(f) Palm. 327; W. Jones,
255; Bend. 141; Cro. Car.

(g) And see per Houghton,
J., in the same report.

(h) Al. 81, ante, p. 370.

been agreed by the Court, that an action of trespass *vi et armis* would lie against a lessee for the taking and carrying away of trees, if the same be not as one continued act. The case itself was an action of trover; and the effect of the decision, according to the note in Comyn's Digest (i), was, that a lessor may maintain trover for the bark of trees cut, although they are carried away or converted at the time of cutting, or afterwards. It is observable, that in the judgment of this case, the above-mentioned decision of *Berry v. Heard* was referred to by the Court, and in terms which in substance correspond with the abridgment of it given by Rolle. Since the determination of these early cases, the point does not appear to have been the subject of legal discussion in this country (j). It was, however, adverted to by the Court of Common Pleas on one occasion; for, in the case of *Clark v. Calvert* (k), Dallas, C. J., is reported to have proposed the question, whether an action of trover could be maintained for trees cut down and carried away at the same time? In criminal law, indeed, it is a clearly established rule that there must be an interval between the severance and removal of a thing to make the taking of it a felony (l). But the principle upon which this rule proceeds in criminal cases seems, in some essential particulars, to be inapplicable to proceedings of a civil nature. Perhaps the subsequent detention of the article in a chattel state may be thought to amount to a conversion, for which an action of trover might be sus-

Chap. I. s. 2.

Subsequent
detention of
article in
chattel state.

(i) Tit. Biens (H.).

(j) There is an American authority, however, to the effect that trover lies for cutting and growing, when a defendant has cut and carried away at one and the same time. The Court said: "If the defendant was, in fact, a trespasser in entering the close and cutting down the corn, the property in it

"corn when cut was in the plaintiff, and the taking it away was a wrong for which

Part II.

tained. And, at all events, a very short interval between the act of severing and taking away the fixture would be sufficient to remove an objection so very technical in its nature, and one which, perhaps, under a non-artificial system of pleading, can scarcely arise (*m*). In practice, it may be found a useful precaution to make a demand of the property previous to bringing the action, because a refusal after demand would probably be deemed evidence of a new conversion.

What will
amount to
conversion.

Next, as regards the question, what will amount to a conversion so as to support this action, it may be said, speaking generally, that a demand and refusal of an article will be evidence of conversion sufficient to go to the jury. But where an outgoing tenant has left upon the demised premises articles not annexed to the freehold, a mere refusal by the landlord, or by the occupier, to deliver such articles to him, will not amount to a conversion, unless it is accompanied by that which amounts to a refusal to allow the outgoing tenant himself to remove them; for the occupier has the option on demand either to let the tenant remove them, or to remove them himself (*n*). In *Wansbrough v. Maton* (*o*), a tenant, after the expiration of his term, left a barn on the premises, which he was entitled to remove as not being attached to the freehold. He demanded it afterwards of the landlord off the premises. The latter refused to allow the removal, and afterwards, when a succeeding tenant was in posses-

(*m*) See the remarks of Bramwell, B., in *Hiort v. Bott*, L. R., 9 Ex. at p. 90.

(*n*) *Wilde v. Waters*, as reported, 24 L. J., C. P. 193; S. C. 16 C. B. 637; *Thoroughgood v. Robinson*, 6 Q. B. 769. In *Wilde v. Waters*, the Court seems to have been of opinion that removable fixtures were

not part of the freehold, and that, therefore, trover would lie for them; that this is not so, see *ante*, Chap. I., p. 29. As to what is not a conversion, see too, *Longstaff v. Meagoe*, 2 A. & E. 167.

(*o*) 4 A. & E. 884, cited, *ante*, p. 373.

sion, came thereon and prevented the first tenant from entering to take the barn away. This was held to be a conversion so as to support an action of trover against the landlord.

Chap. I. s. 3.

With respect to the particular cases in which the action of trover may be resorted to as a mode of determining the right of property in fixtures, it is only necessary to consider the general principles which govern this form of action, with reference to the interest of the plaintiff and the nature of the injury complained of. Thus, in the case of landlord and tenant, where certain mill machinery had been demised with the mill for a term, and the tenant himself, without permission of his landlord, severed the machinery from the mill, and it was afterwards seized and sold under an execution against the tenant, it was held that the property in the machinery instantly vested in the landlord, when separated by the wrongful act of the tenant; and, therefore, that the landlord was entitled to bring trover for it against the purchaser, even during the continuance of the tenant's term (*p*).

In what cases trover lies for fixtures.

By landlord against tenant severing machinery demised.

So where a tenant a short time before his tenancy expired, in taking away a dung heap belonging to himself, dug into and took away a quantity of the virgin soil beneath, it was ruled by Parke, B., that the landlord might maintain trover (or *trespass de bonis asportatis*) for the removal of the earth. His Lordship was of opinion that by such wrongful act the soil became, by operation of law, the personal property of the landlord, and was so completely revested in him as to enable him to maintain *trespass de bonis asportatis* and, *a fortiori*, trover (*q*). Again, in the case of *Weeton v. Woodcock* (*r*), it was held that a

By landlord against tenant for removing soil;

Against the assignees of

(*p*) *Farrant v. Thompson*, 5 B. & Ald. 826; 3 Stark. at p. 131; *Davies v. Connop*, 1 Price, 53, and *ante*, p. 376.

(*q*) *Higgon v. Mortimer*, 6 C. & P. 616. And see *Natham v. Bowden*, 11 Exch. 70.

(*r*) 7 M. & W. 14, referred to, *ante*, p. 138.

Part II.
 tenant, after
 entry for for-
 feiture.

landlord, who had entered for a forfeiture of a lease (wherein was a proviso that the term should cease on the bankruptcy of the tenant), might recover in trover against the assignees in bankruptcy of the tenant, who having, before the landlord's entry, taken possession under the bankruptcy, had afterwards, and while in possession, removed and sold a trade fixture.

Trover lies by
 tenant during
 his term.

But if fixtures are wrongfully severed and removed by a third party, the tenant has during the term a sufficient interest in them to entitle him to maintain trover; and this, although at the end of the term he may be bound by the terms of the demise to leave them for the use of the landlord (s). And so, where a landlord under a distress for rent seized and severed certain fixtures, and afterwards sold them, it was held that trover would lie by the tenant, and that the articles might be described in the declaration as "goods and chattels." For the landlord could not wrongfully distrain and sever the fixtures, and then take advantage of such wrong, and defend the distress by insisting that the plaintiff having (for the purposes of the action) treated the things as goods and chattels, had thereby waived the illegality of the distress (t).

Trover a con-
 current
 remedy with

But upon these subjects the reader is referred to the remarks in the preceding division respecting the action of

(s) *Hitchman v. Walton*, 4 M. & W. at pp. 414, 416; *Boydell v. M'Michael*, 1 Cr. M. & R. 177. See also from the former case that the reversioner may, during the term, maintain trover for fixtures after they are wrongfully removed. But in the case of the abstraction of that which is not a fixture, *e. g.*, a granary merely resting upon staddles, an action for injury to the

reversion is inapplicable, and trover cannot be maintained because the interest during the term is not in the reversioner. *Wiltshier v. Cottrell*, 1 E. & B. 674.

(t) *Dalton v. Whittem*, 3 Q. B. 961. See also *Twigg v. Potts*, 1 Cr. M. & R. 89; *Clarke v. Holford*, 2 C. & K. 540; *M'Gregor v. High*, 21 L. T. 803.

trespass (u). And as trover may be supported whenever trespass *de bonis asportatis* would have been maintainable, the observations which have been offered relative to the latter form of action will sufficiently point out by and against whom an action of trover may be maintained, for the tortious conversion of property after its severance from the realty. The action of trover, however, is in some respects a more extensive remedy than trespass, and is sometimes a preferable mode of proceeding in the case of fixtures. For example, where a sheriff had illegally taken in execution a furnace fixed to the land, and sold and delivered it to a third person, it was held that trespass could not be maintained against the latter, because he came to the possession without any fault on his part (v). In this case, however, an action of trover would have been maintainable, after a demand and refusal; for an unauthorized act which deprives another of his property, though innocently, constitutes conversion (w).

Chap. I. s. 3.

trespass, but
more exten-
sive.

It follows from the rule that trover does not lie for unsevered fixtures, that the plaintiff in a mere claim for conversion cannot recover their value as affixed, though it be considerably more than when they are detached. He cannot, therefore, recover their value as between outgoing and incoming tenant (x). In *The London and Westminster Loan, &c., Company v. Drake* (y), already referred to, the Court held that in an action for preventing the plaintiffs from exercising a right to sever fixtures, the plaintiffs, who were grantees of the fixtures under a bill of sale,

Damages.

(u) *Ante*, p. 366 *et seq.*
(v) 2 Roll. Ab. tit. Tresp. 556, pl. 50; Br. Ab. tit. Tresp. pl. 48; *Day v. Bisbitch*, Cro. Eliz. 374; Yr. Bks. 16 Hen. 7, p. 3, 21 Hen. 7, p. 39. And see *Tomkinson v. Russell*, 9 Price, 287.

(w) *Hiort v. Bott*, L. R., 9 Ex. 86; *Hollins v. Fowler*,

L. R., 7 H. L. 757. See a point as to the form of the demand for *grave v. Du* C. 76. See

(x) *Clark & K.* 540; 21 L. T. 80.

(y) 6 C. I. p. 375.

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could recover their value as severed (z). But in an action of trover, the jury should estimate the fair value of the fixtures as severed, and they are not confined to the price actually realized at a forced sale (a).

ACTIONS FOUNDED UPON CONTRACT.

Actions *ex contractu*, in respect of fixtures.

Fixtures frequently become the subject of an action in form *ex contractu*. For not only does the transfer and disposition of them arise, in general, out of the particular stipulations of parties, which can only be enforced in an action of this nature, but the right of property in them depends in numerous instances upon express or implied agreements, by which the general law of fixtures is modified or controlled. Thus a tenant, by reason of the special terms of his lease, &c., may be restricted from removing articles which by the general law of fixtures he would be entitled to take away (b). So an injury committed by a tenant to things fixed to the freehold may, in some cases, be regarded as an untenantlike use of the demised property, which would amount to a breach of an implied contract under which the premises are held. And in like manner there are a variety of cases in which agreements are made between landlords and tenants, respecting the purchase and valuation of fixtures at the beginning or end of a lease, for which an action in form *ex contractu* is the proper remedy. Again, where things fixed to the freehold have been tortiously removed and converted, the party in whom the property is vested may sometimes waive the tort in respect of the unlawful taking, and proceed as upon an implied contract to pay the value of the articles. Upon this principle, compensation may be recovered in the case of waste committed by a testator in wrongfully severing articles affixed to the freehold; for if it can be shown that the personal estate has thereby received

Waiver of tort.

(z) Compare *Thompson v. Pettitt*, 10 Q. B. 101, *ante*, p. 371.

(a) *M'Gregor v. High*, 21 L. T. 803.

(b) *Ante*, p. 145 *et seq.*

any benefit, his executor will be answerable to that extent in an action for money received for the use of the plaintiff (c). Chap. I. s. 3.

With respect to the form of pleading in cases of this nature, it is to be observed that wherever it is necessary in pleading to describe property existing in a state of union with the freehold, it ought not to be referred to in terms which are applicable to personalty merely (d). Thus, under the former system of pleading, the value of fixtures sold could not be recovered under a count for “goods” sold and delivered. This point was so ruled by Lord Ellenborough, C. J., at *nisi prius* in the case of *Nutt v. Butler* (e). There, an outgoing tenant had left on the premises certain fixtures, consisting of grates and other fixed articles, which the defendant, the incoming tenant, had agreed to take and pay for. The plaintiff declared, in assumpsit (f), for “goods sold and delivered;” and Lord Ellenborough held that the price of the articles could not be recovered under this count, inasmuch as they did not come within the description of goods sold and delivered, being fixed to the freehold, and not separate and undivided chattels. The same point was afterwards adjudged by the Court of Common Pleas, in the case of *Lee v. Risdon* (g). And the importance of attending to the distinction taken in these cases, as arising out of the peculiar nature of fixtures prior to an actual severance, is further shown by the following decision. In an action of replevin, the declaration was for taking goods and chattels,

Pleading,
description of
fixtures in.

(c) *Hambly v. Trott*, Cowp. 371; *Powell v. Rees*, 7 A. & E. 426. In the latter case it was held that the plaintiff might recover in this form of action, notwithstanding that he had already had recourse to an action under 3 & 4 Will. 4, c. 42, s. 2, as to which, see *ante*, p. 356.

(d) *Ante*, p. 370.

(e) 5 Esp. 176.

(f) As to this form of action, see Bullen and Leake, Prec. Pl. (3rd ed.), p. 35.

(g) 7 Taunt. 188. And see *Salmon v. Watson*, 4 Moore (C. P.), 73; *Knowles v. Michel*, 13 East, 249.

Part II.

to wit, a lime kiln. To an avowry for rent arrear, there was a plea in bar that the lime kiln was affixed to the freehold; and it was held that the plea was inconsistent with the declaration, and a departure in pleading. For the Court considered that treating the lime kiln as a chattel would have been correct only if speaking of a moveable thing, as a portable oven for baking lime (*h*).

Term "fix-
tures" suf-
ficient.

Therefore, it will not be correct in ordinary cases to describe the property as goods and chattels, unless the entire cause of action arises after a severance of the fixtures from the freehold; but in every case of a contract executed, it will be safe to adhere to the popular term of "fixtures." Thus, in an action by a tenant for the price and value of "fixtures," bargained and sold, and sold and delivered, it was held that the action was maintainable, although the fixtures were never severed from the freehold (*i*).

(*h*) *Niblet v. Smith*, 4 T. R. 504. See *Dalton v. Whitem*, 3 Q. B. 961; *Twigg v. Potts*, 1 Cr. M. & R. 89. But see *Pitt v. Shew*, 4 B. & Ald. 206, where, however, it is probable that the fixtures in dispute had been severed from the freehold before the sale by the defendant. This view of the case is approved by Parke, B., in *Hallen v. Runder*, 1 Cr. M. & R. at p. 276. See also, by the same judge, in *Twigg v. Potts*, *supra*.

(*i*) *Hallen v. Runder*, 1 Cr. M. & R. 266, *ante*, p. 329. In this case Bayley, B., observed, that the sale effects a severance when the purchase is complete, but not before; and Lord Lyndhurst, C. B., and Bayley, B., seem to draw a distinction between cases where the action is brought by the owner of the inheritance, and

by a tenant. See *Mackintosh v. Trotter*, 3 M. & W. at p. 186, per Parke, B., in argument. In *Sleddon v. Cruikshank*, 16 M. & W. at p. 72, it was said by the same learned judge, that it is not properly *fixtures*, but only a right to detach the erection during the term, which the Courts have held may be recovered in such an action (see *ante*, p. 31). In that case the Court held that a contract for the assignment of a lease, and for the sale of a greenhouse, was entire, and that the plaintiff could not recover for the greenhouse unless he procured an assignment of the lease. And see *Neal v. Viney*, 1 Camp. 471. As to the meaning of the term "fixtures" in pleading, see *ante*, p. 374.

Where a person has agreed to take fixtures at a valuation, as was the case in *Hallen v. Runder* (*j*), and a valuation has accordingly been made by appraisers, it is in effect an ascertainment of the price by the parties themselves (*k*); and it will, therefore, in most cases, be final, so that an action will not lie for the recovery of a part of such price, as having been paid by mistake (*l*).

Chap. I. s. 8.

Effect of valuation in pursuance of agreement.

It will not be necessary on the present occasion to enter more minutely upon the subject of actions founded on contracts concerning fixtures; because, except as regards the points already noticed, there does not appear to be any distinction between actions of this description and such as relate to any other subject matter of agreement.

(*j*) *Supra*.

(*k*) *Salmon v. Watson*, 4 Moore (C. P.), 73.

(*l*) *Freeman v. Jeffries*, L. R.,

4 Ex. 189. Compare *Robinson v. Anderton*, Peake, 94.

CHAPTER II.

OF OTHER LEGAL PROCEEDINGS IN RESPECT OF
FIXTURES.

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SECTION I.

On the Exemption of Fixtures from Distress.

Part II.

Things
annexed to
freehold
not distrain-
able.

It is an established rule of law, that things adhering to the freehold cannot be taken under a distress, whether for rent, services, fines, or duties, &c. (a). And this rule holds, not merely in respect of things which are so annexed as not to be afterwards severable, but it applies to fixtures of whatever nature or construction, and whether put up for trade or for any other purpose.

Ground of the
exemption.

The reasons for this exemption are thus explained by Chief Baron Gilbert (b):—"A distress . . . was an-
ciently no more than a pledge in the hands of the lord,
to compel the tenant to pay the service, or perform the
duty, for which it was taken; and therefore at common
law could not be sold, but like all other pawns or pledges
was to be restored to the owner when the service or duty

(a) *Quære*, as to a distress for *poor rates*, or other similar demands which are in the nature of executions? See *Hutchins v. Chambers*, 1 Burr. at p. 588; Com. Dig. tit. Distress (C.).

(b) Gilb. Dist. (ed. 1757) p. 34, (4th ed. p. 31). And see the reasons assigned in *Simpson v. Hartopp*, Willes, at p. 514 *et seq.*; and *Pitt v. Shew*, 4 B. & Ald. 206.

“ was performed (c). The nature then of contracting by
 “ pawns or pledges being that upon payment of the money
 “ for security whereof they were given, the pawn or pledge
 “ ought to be restored to the owner in the same plight and
 “ condition it was delivered.” Afterwards (d), he observes,
 “ Whatever is part of the freehold cannot be distrained, for
 “ what is part of the freehold cannot be severed from it
 “ without detriment to the thing itself in the removal; and
 “ consequently that cannot be a pledge that cannot be re-
 “ stored *in statu quo* to the owner. Besides, what is fixed
 “ to the freehold is part of the thing demised; but the
 “ nature of the distress is not to resume part of the thing
 “ itself for the rent, but only the *inducta et illata* upon the
 “ soil or house ” (e).

Chap. II. s. 1.

The rule upon this subject is mentioned in very early authorities. In the Year Book 20 Hen. 7, p. 13, the Court, in discussing the right of the heir to take furnaces, fixed tables, the covering of beds, &c., treat such things as being clearly exempt from distress; and a similar opinion is expressed in the Year Book 21 Hen. 7, p. 26 (f). And in conformity with these cases, Lord Coke lays it down generally, that furnaces, cauldrons, or the like, fixed to the

(c) Upon the origin of the right of distress, and the principles by which it ought to be governed, see Pothier, *Traité du Contrat de Louage*, part 4, ch. 1.

(d) Gilb. Dist. (ed. 1757) p. 42, (4th ed. p. 38).

(e) The above passages have been cited with approval in modern authorities. See *Hel-lawell v. Eastwood*, 6 Exch. at p. 311; *Turner v. Cameron*, L.R., 5 Q. B. at p. 312. What is subsequently erected is considered in law as part of the demised premises, and is said

to be potentially demised; and therefore an action of waste lay against a lessee for not repairing a house erected by himself on the demised land, and the writ might be in *domibus dimissis*. *Lord Darcy v. Askwith*, Hob. 234. Upon this subject, see *Hoby v. Roebuck*, 7 Taunt. 157. And see Serj. Hill's MS. note in Vin. Ab. tit. Waste (E.), in Lincoln's Inn Library.

(f) See also Br. Ab. tit. Chattels, pl. 7; *id.* tit. Distresse, pl. 29.

Part II.

Things fixed
to freehold,
absolutely
privileged.

freehold, cannot be distrained (*g*). Indeed, all the authorities concur in stating this principle to be a part of the common law (*h*), although it should be mentioned that there is one case in which a learned Vice-Chancellor seems to have been under a slight misapprehension as to the law upon this point (*i*). And it is to be observed, that the privilege in these cases is absolute; for things fixed to the freehold cannot be distrained, even though there is no other distress upon the premises. In this respect, therefore, the privilege is of a higher nature than that in favour of instruments of trade and agriculture; for these are only partially exempted, and are liable to be taken when there is no other sufficient distress to be found (*j*).

So of things
constructively
annexed ;

The same principle, it may also be remarked, extends to things which are only constructively annexed to the freehold. For the doors and windows of a house, hanging only upon hooks, and which are moveable, are not distrainable. And so of a millstone, which, though not annexed to the freehold, is yet essentially parcel of the mill (*k*), and the same thing may be said of a moveable part of a fixed

(*g*) Co. Lit. 47 b.

(*h*) Vide 1 Roll. Ab. tit. Dist. (H.); Com. Dig. tit. Dist. (C.); *Davies v. Powell*, Willes, 46; *Simpson v. Har-
topp*, *id.* at p. 514; *Gorton v. Falkner*, 4 T. R. at pp. 567, 569; *Pitt v. Shew*, 4 B. & Ald. 206. See, too, *Clarke v. Hol-
ford*, 2 C. & K. 540; *M'Gregor v. High*, 21 L. T. 803. And see as to a lime-kiln, *Niblet v. Smith*, 4 T. R. 504. That a replevin does not lie for things affixed to the freehold, see Bac. Ab. tit. Replevin (F.).

(*i*) Viz., *Wood*, V.-C., in *Mather v. Fraser*, 2 K. & J. 536. As to which see *Walms-*

ley v. Milne, 7 C. B. (N. S.) at p. 129; *Holland v. Hodgson*, L. R., 7 C. P. at p. 338.

(*j*) Vide *Simpson v. Har-
topp*, Willes, at p. 514, 1 Sm. L. C. at p. 453 (8th ed.); *Gorton v. Falkner*, 4 T. R. at p. 569; *Fenton v. Logan*, 9 Bing. 676.

(*k*) Yr. Bk. 14 Hen. 8, p. 25; Finch, Bk. 2, p. 135. And see *ante*, pp. 20, 277. Charters, &c., cannot be distrained, for they are not chattels in law, Br. Ab. tit. Dist. pl. 29; *id.* tit. Replevin, pl. 34; Brownlow, 168; *ante*, p. 249. As to hop poles, see *ante*, p. 8, note (*e*).

machine (*l*). And it is held, that even a temporary removal of such things for purposes of necessity is not sufficient to destroy the privilege. Thus, in *Wystow's case* (*m*) it was adjudged, that if a millstone is severed and lifted out of its place, in order to be picked, it is not distrainable; for it still continues parcel of the mill, as it lies all the time on the other stone, and the removal is of necessity and for the good of the commonwealth (*n*). And it was further said, that it would be the same although the stone was detached and carried away for the purpose of picking (*o*).

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though removed for a temporary purpose.

In the report of the last-mentioned case a *quære* is subjoined, whether the anvil of a smith would be free from distress. And in Brooke's Abridgement there is the like *quære* (*p*). Chief Baron Gilbert, in alluding to this question, states expressly, that the anvil would be protected; for, he says, it is accounted part of the forge, though it be not actually fixed by nails to the shop (*q*). So, also, Sir John Romilly, M. R., on a modern occasion held that an anvil, though not fixed, formed part of a steam hammer with which it was used, upon the ground that it essentially formed a part of the machine (*r*). Lord Kenyon, however, appears to consider that the ancient authorities respecting

Smith's anvil, whether distrainable.

(*l*) *Mather v. Fraser*, 2 K. & J. 536, 559. And as to duplicate parts of a machine, see *Ex parte Astbury*, L. R., 4 Ch. 630, 634; *ante*, p. 21.

(*m*) Yr. Bk. 14 Hen. 8, p. 25.

(*n*) And as to this, see Br. Ab. tit. Dist. pl. 23; Finch, *ubi supra*; *Liford's case*, 11 Co. 50 b; Gilb. Dist. p. 39 (4th ed.); *R. v. Wheeler*, 6 Mod. 187; *Place v. Fagg*, 4 M. & R. 277.

(*o*) *Ante*, p. 20. But if it is wholly severed and removed

from the mill, then it is not part of the mill, and is distrainable. Finch, *ubi supra*. And so, if a man has two millstones, and one only is in use, and the other lies by, not used. *Simpson v. Hartopp*, Willes, at p. 516, 1 Sm. L. C. at p. 455 (8th ed.). Compare *Ex parte Astbury, supra*.

(*p*) Tit. Distresse, pl. 23.

(*q*) Gilb. Dist. *ubi supra*.

(*r*) *Metrop. Counties, &c., Society v. Brown*, 26 Beav. 454, 459.

Part II — The rule is now presented upon the ground of its being
 established by the authorities.

It is to be
 observed that
 the rule is
 not a general
 one, but is
 confined to
 certain cases.

In a case before the Court of Exchequer, it was
 argued that the rule above laid down
 of articles attached to the building being protected from
 distress was not to be taken as a general rule, but was to
 be understood only of things which could not be restored
 to the owner in any way. And therefore it was insisted
 that certain machinery put up in a factory by a tenant,
 which was fixed only by bolts and screws to the floor,
 might be distrained; because it could be removed and
 replaced without sustaining any injury whatever. But it
 was answered, that the instance of the millstone, above
 noticed, established a principle which admitted of no such
 exception; for, in that case, the article might be taken away
 without detriment either to itself or the principal thing.
 The determination of the case ultimately proceeded upon a
 different ground, and the point was not noticed in the
 judgment of the Court. But in *Darby v. Harris* (u) the
 strict rule of law, as it was laid down by the earlier autho-
 rities, was adopted by the Court of Queen's Bench. For
 it was there expressly held that tenant's fixtures, viz.,
 kitchen ranges, stoves, coppers, and grates, were not dis-
 trainable for rent. Moreover, the reason for the rule, as it

Tenant's
 fixtures.

(s) *Gorton v. Falkner*, 4 T.
 R. at p. 567. And see Com.
 Dig. tit. Distress (C.). So in
Jollie and Broad's case, 2 Rolle,
 at p. 202, where it is said that
 millstones and anvils cannot
 be distrained, it is on the
 ground of their being instru-
 ments of trade. See *Twigg v.*
Potts, as reported 3 Tyr. 969,
 where trespass was brought
 for seizing, under a distress
 for rent, fixtures, as anvils,
 bellows, vices, &c.; the point,
 however, was not raised in

this case.

(t) *Duck v. Braddyll*, M'Clel.
 217.

(u) 1 Q. B. 895. And see
Twigg v. Potts, 1 Cr., M. & R.
 89. See also *Dalton v. Whit-*
tem, 3 Q. B. 961, where held,
 that if a landlord under a dis-
 tress for rent severs fixtures
 and disposes of them, he is
 liable in trover. Upon this
 point, see, too, *Clarke v. Hol-*
ford, 2 C. & K. 540; *M'Gregor*
v. High, 21 L. T. 803.

has been above explained, was on that occasion declared by Chap. II. s. 1. the Court to be the correct one.

The question again arose in the Court of Exchequer in the case of *Hellawell v. Eastwood* (v), with reference to certain machines called "mules" in a cotton mill, which were fixed by means of screws, some into the wooden floor, some into lead which had been poured in a melted state into holes in the stone flooring. The Court there held that the machines in question were distrainable for rent, but they so decided in consequence of their having formed an opinion that the "mules" had not lost the character of moveable chattels; and it is plain from the language of the judgment that the Court did not mean to decide that tenant's fixtures were distrainable, for they admitted that what was a part of the land could not be distrained. With reference to this case, moreover, it should be noticed that, as has been stated in the first chapter (w), the later decisions show that machines affixed in a similar manner to that above described, do cease to be chattels and become a part of the land. It has since been decided by the Court of Queen's Bench that the rails and sleepers of a railway connected with a coal mine, having by reason of their annexation to the freehold become fixtures, could not be distrained by the landlord (x). And the Court there said: "The simple question is, did these railways, notwithstanding such annexation as is described in the case, retain the character of personal chattels; for, if they did not, they were not liable to be distrained for rent" (y).

Decision in *Hellawell v. Eastwood* considered.

Turner v. Cameron—rails, sleepers.

The service by a landlord upon his tenant of a notice of distress, which states that the former has distrained certain

Mere threat of distress not actionable.

(v) 6 Exch. 295, 310; *ante*, p. 10. plates and sleepers of which are me
(w) *Ante*, pp. 15, 18. of the,
(x) *Turner v. Cameron*, L. fort v.
R., 5 Q. B. 306; *ante*, p. 5, (y)
note (o). It would be otherwise of a railway, the tram. R., 5 (

Part II.

Tenant may
obtain injunc-
tion.

fixtures upon the demised premises, in addition to articles which are properly the subject of a distress, is not sufficient, even where the landlord has gone so far as to advertise the fixtures for sale, to give a cause of action to the tenant; for the mere intention to do a wrong is not in itself actionable. The tenant should not, therefore, commence an action in respect of a tortious distress upon fixtures, until something has been done, as by actual seizure, to make them of less value (z). A tenant can, however, obtain an injunction to restrain a threatened distress, although the Court may, in the exercise of its discretion, only grant it upon the terms of his bringing the rent due into Court (a).

Growing corn
distrainable.

It may perhaps deserve to be mentioned in this place, that the principles of the common law were so repugnant to any distress being levied upon the freehold itself, that even *fructus industriales*, as corn, hops, and other things growing upon the soil, could not be distrained. This, however, was altered by the statute 11 Geo. 2, c. 19, s. 8, as between landlord and tenant. For, by that statute, landlords are enabled to distrain corn, grass, hops, &c., or other produce growing on the demised premises, for arrears of rent. The provisions, however, of this statute have received a strict construction. For it has been decided, that they apply only to produce of a similar nature to that specified in the Act; and, therefore, it was held that trees and shrubs growing in a nursery ground remain as at common law, and are not distrainable (b).

Nursery trees
not distrain-
able.

(z) *Beck v. Denbigh*, 29 L. J., C. P. 273. The statement attributed to Willes, J., in this report, that fixtures *can* be removed under a distress for rent, is clearly a clerical error.

(a) *Shaw v. Earl of Jersey*,

4 C. P. D. 120, 359. As to an injunction generally, see *ante*, p. 359 *et seq.*

(b) *Clarke v. Gaskarth*, 8 Taunt. 431. Acc. *Clark v. Calvert*, *id.* 742. See generally on this subject Woodfall's L. & T. p. 404 *et seq.* (12th ed.)

SECTION II.

On Taking Fixtures under Legal Process.

IT seems to have been formerly considered that things Chap. II. s. 2.
annexed to the freehold were not liable to be taken in
execution, like the moveable goods and chattels of the
debtor (*a*). But this rule of law has given way to a more
liberal construction in favour of creditors in modern times;
and for their benefit, *fixtures* are now considered to be so
far in the nature of personal chattels, that in certain cases Fixtures seiz-
able under
process.
they may be seized and removed under a writ of *fi. facias*,
or other similar process (*b*). Thus it was holden, in *Poole's*
Case (*c*), that articles put up by a tenant in relation to his
trade, and which he was entitled to remove at the end of
his term, might be seized in execution by a sheriff under
a *fi. fa.* But the sheriff can only seize for removal But not if
judgment
debtor has no
right to sever.
as *chattels* (*d*) things which the judgment debtor could
himself remove; and, therefore, if a tenant has precluded
himself from exercising the right of severance, the fix-
tures cannot be so seized at the suit of the judgment
creditor (*e*).

(*a*) Yr. Bks. 20 Hen. 7, p. 13, 21 Hen. 7, p. 26; *Day v. Bisbitch*, Cro. Eliz. 374. And see 1 Roll. Ab. tit. Execution (Y.), p. 891; Com. Dig. tit. Execution (C. 4); *id.* tit. Process (D. 6); Gilb. Exec. 19. Under the writ of attachment in real actions, the sheriff could only take the moveable goods of the defendant, and not a chattel real, or a thing affixed to the freehold, Com. Dig. tit. Process (D. 6); Vin. Ab. tit. Attachment (B.), (C.); 2 Inst. 254.

(*b*) Approved by Parke, B., in *Horsfall v. Hey*, 2 Exch. at p. 779. That they are not chattels for all purposes, see *Hallen v. Runder*, 1 Cr., M. & R. at p. 275; and *ante*, p. 28.

(*c*) 1 Salk. 368. And see *Ryall v. Rolle*, 1 Atk. at pp. 171, 176; *Gibson v. Hammer-smith Rail. Co.*, 32 L. J., Ch. at p. 341.

(*d*) See *post*, p. 396.

(*e*) *Dumergue v. Rumsey*, 2 H. & C. 777; *R. v. Topping*, M'Clel. & Y. 544. And see *Richardson v. Ardley*, 38 L. J.,

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Rule not confined to trade fixtures.

And although the decision in *Poole's Case* related to trade utensils, and a distinction seems to have been taken by Lord Holt on this particular ground (e), yet it is now generally understood that the rule is the same with respect to other fixtures, whether put up for ornament or any other purpose, and that all are alike to be considered as goods and chattels for the benefit of execution creditors (f).

Whether erections of great magnitude seizable.

Things severable by virtue of powers, &c., not seizable;

It is not, however, decided by any of the cases that all articles and erections of whatever magnitude and construction, if put up by a tenant for trade or other privileged object, are liable to be seized in execution. Indeed, in the case of *Steward v. Lombe* (g), Burrough, J., expressed himself of opinion, that such a structure as the mill which was then the subject of dispute (h) could not be taken in execution, although it might be erected by, and was in the possession of, a tenant. And it is to be observed, that it is only in the peculiar case of fixtures that the law regards things attached to the realty as personal chattels in favour of creditors. For the same privilege does not exist in

Ch. 508; *Duke of Beaufort v. Bates*, 3 D., F. & J. 381, where it was held that tram-plates and sleepers merely laid upon the surface of the ground were not within a covenant to yield up "ways" and "roads" at the end of the term, and that they might, therefore, be taken in execution. As to an injunction to restrain the sheriff, see *Richardson v. Ardley*, *supra*.

(e) See, too, per Kindersley, V.-C., in *Gibson v. Hammer-smith R. Co.*, 32 L. J., Ch. at p. 341.

(f) See *Place v. Fagg*, 4 M. & R. 277; *Winn v. Ingilby*, 5 B. & Ald. 625; *Barnard v.*

Leigh, 1 Stark. 43; *Pitt v. Shew*, 4 B. & Ald. at p. 207, per Abbott, C. J.; and per Parke, B., in *Minshall v. Lloyd*, 2 M. & W. at p. 459. In the case of *Allen v. Allen*, Mosely, 112, it seems admitted in argument, that marble chimney-pieces and glasses are ornaments every day taken down by tenants, and also upon executions.

(g) 1 Brod. & Bing. 506, 512.

(h) The mill was a wooden edifice raised on a casement of brick work, and anchored into the ground by spores and land ties; but the jury had found that it was not a fixture.

respect of articles which are removeable under powers appendant to estates, or by virtue of the private agreement of parties. And, therefore, it was observed by Lord Holt, in *Poole's Case* above cited, that there was a difference between a common tenant and a tenant for years without impeachment of waste; for in the latter case, he said that the sheriff could not cut down and sell, though the tenant himself might.

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Moreover, it has been held that a sheriff is not allowed to take in execution articles which have been set up by the owner in fee upon his own freehold. In the case of *Winn v. Ingilby* (i), a sheriff had, under a writ of *fi. fa.*, seized certain fixed articles, consisting of set pots, ovens, and ranges; and it appeared that the house to which they were attached was the freehold of the person against whom the writ issued. The Court of King's Bench determined that the articles in question were not liable to be seized in execution. And they said that the freehold belonging to the party made it different from other cases, and that, as against him, the articles could not be taken as goods and chattels. So, also, in the above-mentioned case of *Steward v. Lombe*, where a person seised in fee of land with a windmill erected thereon, mortgaged the land and mill, it was holden that the mill could not be taken in execution by a creditor of the mortgagor, although he continued in possession after the mortgage. The Court indeed in this case confined their attention principally to another point; but Richardson, J., seemed to think that there might have been a difference if the mortgagor had, as tenant for years, erected the mill (j). The same point was again ruled in the case of *Place v. Fagg* (k). Nevertheless, it does not appear to be satisfactorily established by any of these cases,

nor things
set up by
owner in fee.

Whether
executor's
fixtures seiz-
able.

(i) 5 B. & Ald. 625.

(j) 1 Brod. & Bing. at p. 513.

(k) 4 M. & R. 277. See also per Bayley, B., in *Hallen v. Runder*, 1 Cr., M. & R. at pp. 268, 269.

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that articles erected by the owner of the freehold can in no instance whatever be taken in execution by virtue of a writ of *fi. fa.* The judgment of the Court in the case of *Winn v. Ingilby* has indeed been supposed to have decided this point. But it is observable, that the Court in that case, as well as in the case last referred to, assumed that the property in question would descend to the heir as an essential part of the freehold, and would not pass as personalty to the executors. And Wood, V.-C., in *Mather v. Fraser* (1), appears to base the distinction in the case of the owner of the freehold upon the same ground; viz., that the articles which it is sought to seize, would as between heir and executor pass to the former. The decisions, therefore, cannot perhaps be regarded as authorities for the exemption generally of fixtures which tenants for life, in tail, or even in fee, may set up, and which their executors would be entitled to, as partaking of the nature of personalty (m).

When fixed articles demised may be taken in execution.

It remains only to observe, in respect of another class of fixed articles, viz., those which are demised to a tenant together with the premises to which they are attached (as in the case of a brewery leased with the plant and machinery), that the sheriff is authorized to seize and convey the lessee's interest in the fixed property, of whatever

(1) 2 K. & J. at p. 550. And see *Scorell v. Borall*, 1 Y. & J. at p. 398, per Hullock, B.

(m) See *Evans v. Roberts*, 5 B. & C. at p. 841, per Little-
dale, J.; *Ex parte King*, 1 M.
D. & D. at p. 129. Growing
crops which are *fructus in-*
dustriales, and go to the exe-
cutor, are seizable in execu-
tion as *goods and chattels*,
Gilb. Exec. 19; *Poole's case*,
1 Salk. 368; *Peacock v. Purvis*,
2 Brod. & Bing. at p. 368,
per Richardson, J.; *Evans v.*

Roberts, supra. As the right
of seizing things attached to
the realty seems to be closely
connected with the right of
removal under the law of fix-
tures, it may be useful, in
determining questions of this
description, to inquire into the
nature of the power under
which the party himself might
remove the articles in ques-
tion. As to the distinctions
upon this subject, see *ante*,
p. 186 *et seq.*

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When sheriff bound to sell fixtures separately.

(o) *Farrant v. Thompson*,
5 B. & Ald. 826.

(p) *Barnard v. Leigh*, 1 Stark. 43.

CHAPTER III.

OF CRIMINAL LAW IN ITS APPLICATION TO PROPERTY
AFFIXED TO THE FREEHOLD.**Part II.**

Fixtures not
the subject of
larceny, at
common law.

FIXTURES are not the subject of larceny at common law. For to constitute larceny there must be a felonious taking and carrying away the *personal goods* of another (*a*) ; and fixtures, by reason of their adherence to the freehold, cannot be regarded as personal goods. Accordingly, in the case of *Lee v. Risdon* (*b*), Gibbs, C. J., referring to this species of property, says, "felony cannot be committed of these things ; for, if a thief severs a copper, and instantly carries it off, it is no felony at common law." He then adds, "if, indeed, he lets it remain after it is severed any time, then the removal of it becomes a felony, if he comes back and takes it ; and so of a tree which has been some time severed" (*c*). But this must be understood of a case in which there has been an actual abandonment by the wrongdoer, and not a mere cessation of his physical possession of the article. Thus, if a thief, after severing a fixture, hides it with the intention of coming back to remove it, and after a short interval returns and carries it away, the subsequent removal will not make the offence larceny. In such a case, the severance and removal are regarded as one continuous act, and therefore there

(*a*) *Vide* Bract. *Lib.* iii. c. 32 ; 3 Inst. 107.

(*b*) 7 Taunt. at p. 191. And see per Bayley, J., in *Colegrave v. Dias Santos*, 2 B. & C. at p. 80.

(*c*) So, if a man cut and carry away corn at the same time, it is trespass only and not felony, because it is but

one act ; but if he cut it and lay it by, and carry it away afterwards, it is felony. *Emmerson v. Annison*, 1 Mod. 89, per Hale, C. J. ; and see Hale, P. C. 510. That dung spread upon land is not the subject of felony, see *Yearworth v. Pierce*, Al. 31 ; and *ante*, p. 215, note (*i*).

cannot be a conviction for larceny for taking that which is not capable in its original state of being the subject of larceny (*d*).

The principle, that the taking of property fixed to the freehold, even though done *animo furandi*, does not amount to felony unless an interval elapses between the severance and removal, has been recognized by all the writers upon criminal law (*e*). It is thus explained by Sir William Blackstone in his Commentaries (*f*):—"Lands, tenements, and hereditaments (either corporeal or incorporeal) cannot in their nature be taken and carried away. And of things likewise that adhere to the freehold, as corn, grass, trees, and the like, or lead upon a house, no larceny could be committed by the rules of the common law; but the severance of them was, and in many things is still, merely a trespass, which depended on a subtilty in the legal notions of our ancestors. These things were parcel of the real estate; and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immovable. And if they were severed by violence so as to be changed into moveables, and at the same time, by one and the same continued act, carried off by the person who severed them, they could never be said to be taken *from the proprietor*, in this their newly acquired state of mobility, (which is essential to the nature of larceny,) being never, as such, in the actual or constructive possession of any one, but of him who committed the trespass. He could not in

(*d*) *R. v. Townley*, L. R., 1 C. C. R. 315; and see *R. v. Read*, 3 Q. B. D. 131. It has been held that the buried carcass of a diseased pig is not so far attached to the soil as to necessarily cease to be the subject of larceny. *R. v. Edwards*, 13 Cox, C. C. 384.

(*e*) See 3 Inst. 109; Hale,

P. C., 510; Hawk. P. C. Bk. 1, ch. 19, § 34 (8th ed.); East, P. C. (ch. 16, § 27), p. 587. And see *Emerson v. Amell*, Freem. K. B. 22; *Udal v. Udal*, Al. 83; *Berry v. Heard*, Palm. 327; *R. v. Westbeer*, Str. 1134; *R. v. De Veaux*, 2 Leach, C. C. 587.

(*f*) Vol. IV. p. 232.

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“strictness be said to have taken what at that time were
 “the personal goods of another, since the very act of
 “taking was what turned them into personal goods.”
 The reasoning contained in this passage may not, perhaps, be deemed very satisfactory at the present day; indeed, it has very recently been stigmatized by a high authority as “essentially absurd” (*g*). The rule itself, however, must still be understood as the established rule of common law (*h*); and it is applicable to every species of property annexed to land, except in certain cases which have been made the subject of express legislative provision.

Fixtures not considered a part of the freehold, in *favorem vitæ*.

But the principle that fixtures are to be deemed parcel of the freehold, seems to have been relaxed in cases where it would operate to the prejudice of a prisoner. For it has been doubted whether a press or cupboard, let into the walls of a house, is to be so far deemed a part of the house, as to make the breaking it open to be burglary, or an offence within the statutes relating to house-breaking. Sir Michael Foster was of opinion that it ought not; and he thought that in capital cases, such fixtures, which merely supply the place of chests and other ordinary utensils of household furniture, should in *favorem vitæ* be considered in no other light than as mere moveables, partaking of the nature of those utensils and adapted to the same use (*i*).

Legislative provisions in respect of fixtures, &c.

There are, however, certain cases in which the Legislature has, at different periods, interfered to afford protection

(*g*) Mr. Justice Stephen in his History of the Criminal Law, Vol. III. p. 148.

(*h*) It was proposed by the Criminal Code Commissioners of 1879 to abolish the common law rule, by enacting that all inanimate things being the property of any person, and either being moveable, or which might be made moveable, except things growing

out of the earth under a shilling in value, should be capable of being stolen. Stephen's Hist. Criminal Law, Vol. III. p. 162. No doubt an enactment of this nature will form part of the Criminal Code, whenever it is passed.

(*i*) Fost. C. C. 109: and see Hale, P. C. Vol. I. p. 554, Vol. II. pp. 355, 358; East, P. C. 489; Kel. C. C. 59, 69.

to property fixed to the freehold, where, from its nature, it would be particularly exposed to theft or injury. The earlier enactments made with this view have been wholly repealed, and other provisions, having the same general object, but of a more comprehensive nature, have been introduced by the Larceny Act, 1861 (*j*), and by another statute passed at the same period.

By sect. 31 of the former Act, to steal, rip, cut, sever, or break with intent to steal, any glass or woodwork (*k*) belonging to any building whatsoever (*l*), or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, or of both, respectively fixed in or to any building whatsoever (*m*); or any thing made of metal fixed in any land (*n*), being private property, or for a fence to any dwelling-house, garden, or area, or in any square or street, or in any place dedicated to public use or ornament, or in any burial ground (*o*), is made felony, and is punishable as in the

Stealing fixed property.

(*j*) 24 & 25 Vict. c. 96.

(*k*) In *R. v. Hedges*, 1 Leach, C. C. 201, it was held that window-sashes, which were neither hung nor beaded in the frames, but only fastened to the frames by laths nailed across, were not fixed to the freehold. But this section appears to comprehend all cases of this description.

(*l*) As to what is a building, see *R. v. Worrall*, 7 C. & P. 516; *R. v. Rice*, Bell, C. C. 87; *R. v. Hickman*, 1 Leach, C. C. 318; *R. v. Norris*, Russ. & Ry. 69. These, and some of the cases in the following notes, were cases under the repealed statutes, but as these latter were in many respects similar to those now in force

such decisions may be usefully referred to.

(*m*) See *R. v. Gooch*, 8 C. & P. 293. An indictment for stealing a copper pipe fixed to the dwelling-house of A. and B., is not supported by proof of stealing a pipe fixed to two rooms, of which A. and B. are separate tenants in the same house. *R. v. Finch*, 1 Moo. C. C. 418.

(*n*) Metal screwed on a post, fixed in the soil, is within the section. *R. v. Jones*, 27 L. J., M. C. 171.

(*o*) In *R. v. Jones*, *supra*, a case under 7 & 8 Geo. 4, c. 29, it was decided that a copper sun-dial, fastened by screws to a post fixed in a churchyard, was within the

Sec. 2

It is not necessary to prove the same to be the property of any person.

Stealing fixtures as well as the land.

By sect. 24 it is made felony punishable as therein provided. It is not necessary to prove any fixtures let to be taken in it with any intent of taking: and in every case of stealing such a fixture an indictment may be preferred in the same form as if the offender were not a tenant or holder. And the property may be laid in the owner or person having it then. By sect. 32, and following sections, it is made felony in certain cases to steal or cut, &c., with intent to steal, growing trees, &c., saplings, shrubs,

Stealing growing trees, &c.

provisions of sect. 44 of that Act. This enactment did not contain any mention of a burial-ground and Bramwell, B., therefore, in the above case, doubted whether a churchyard was for "public use or ornament."

(p) That a defendant cannot be convicted of simple larceny upon an indictment under this section, see *R. v. Gooch*, 8 C. & P. 293. See, too, *R. v. Millar*, 7 C. & P. 665. In the very recent case of *R. v. O'Brien*, 15 Cox, C. C. 29, the prisoners were indicted at common law for larceny and receiving the goods, &c.; they were acquitted on the ground that the thing stolen was a copper furnace fixed in wood and brick in a building. Upon being indicted under the above section they pleaded *autrefois acquit*, but were convicted. It was held by the Court for Crown Cases Reserved, that the conviction was right, as

the prisoners were never in jeopardy on the first indictment.

q By sect. 28 the stealing, or for any fraudulent purpose destroying, &c., any document of title to lands (see sect. 1) is made felony. At common law there could be no larceny of such documents, because they were said to savour of the realty. To obtain a conviction under this section there must be such a taking of the document as would constitute larceny but for the common law rule. *R. v. John*, 7 C. & P. 324.

(r) But see 27 & 28 Vict. c. 47, s. 2.

(s) Sects. 33, 36 and 37.

(t) Where there is a continuous act, the value of several trees, &c., may be added together in estimating the amount of injury under this section. *R. v. Shepherd*, L. R. 1 C. C. R. 118.

Chap. III.

underwood, plants, roots, fruits, or vegetable productions (*u*). In certain, however, of the like cases the offence is made punishable on summary conviction (*v*). And by sect. 34 of the same Act, provision is made against the offences of stealing, or cutting, breaking, or throwing down with intent to steal, any part of any live or dead fence, or any wooden post, pale, wire, or rail, &c., or any stile or gate, &c. Again, by sect. 38, the stealing the ores of any metal, &c., or coal, from any mine, bed, or vein, is declared to be felony (*w*).

Fences, gates, &c.

Ores, coals, &c., from mines.

In like manner with respect to malicious injuries committed to fixtures, or to private property of a like description, provision is made by the statute 24 & 25 Vict. c. 97. For by sect. 13 of that statute, the unlawful and malicious pulling down or demolishing of any dwelling-house or other building by a tenant for years or at will, or person holding over after the termination of any tenancy, or the unlawful and malicious pulling down or severing from the freehold by such persons of any fixture fixed in or to such dwelling-house or building, is declared to be a misdemeanour. So by sect. 14, the unlawful and malicious cutting, &c., or damaging silk and other articles (as specified) in the loom or frame, or on any machine or engine, &c.; or cutting, damaging (*x*), &c., any loom, frame, machine, engine, &c., whether fixed or moveable, employed in manufacturing the above goods, is declared to be felony.

Malicious injuries to fixtures, &c.

(*u*) In *R. v. Hodges*, Moo. & M. 341, it was held that the words "plant or vegetable production" in the 42nd section of 7 & 8 Geo. 4, c. 29, did not include young fruit trees.

(*v*) See 42 & 43 Vict. c. 49.

(*w*) For a decision on the corresponding section in 7 & 8

Geo. 4, c. 29, respecting mines, see *R. v. Webb*, 1 Moo. C. C. 431. But see now sect. 39 of 24 & 25 Vict. c. 96. See, too, *R. v. Trevenner*, 2 Moo. & R. 476, a case under the repealed sect. 10 of 2 & 3 Vict. c. 58.

(*x*) *R. v. Tacey*, Russ. & Ry. 452.

Part II.

Malicious injuries to machinery, &c. ;

In mines.

Injuries to machinery, &c., by riotous assemblies.

Remedy against the hundred.

Also by sect. 15 it is made felony unlawfully and maliciously to cut, break, destroy, or damage, &c. (x), any machine or engine, whether fixed or moveable, used in agricultural operations or employed in any manufacture whatsoever (except such as are provided for in the foregoing section) (y). Again, by sect. 29 of the same statute, provision is made against the like mischief committed in mines; and it is thereby made felony maliciously to pull down or destroy, or damage with intent, &c., any steam engine or other engine for working, &c., mines; or any staith, building or erection used, &c., in a mine (z); or any bridge, waggon-way, or trunk for conveying minerals from a mine.

So, with regard to offences committed against property of this nature by riotous assemblies of persons:—By the same statute, sect. 11, the demolishing or pulling down by persons riotously assembled, of mills, &c., or any machinery, whether fixed or moveable, employed in any manufacture; or any steam engine or other engine for mines; or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from mines, is declared to be a felony, with a maximum punishment of penal servitude for life.

Lastly, by 7 & 8 G. 4, c. 31, extended by 2 & 3 W. 4, c. 72, a remedy is given against the hundred for injuries of this description.

(x) *R. v. Fisher*, L. R., 1 C. C. R. 7.

(y) The destruction of a part of a threshing machine which has been taken to pieces and separated is within the statute. *R. v. Mackerel*, 4 C. & P. 448; *R. v. Fidler*, *id.* 449. And see further, upon the construction of this statute, *R.*

v. Bartlett and *R. v. Chub*, 2 Dea. C. L. 1517; *R. v. West*, *id.* 1518.

(z) As to what is an erection used in conducting the business of a mine, see *R. v. Whittingham*, 9 C. & P. 234. And for other points upon the statute, see *S. C.*, and *R. v. Norris*, 9 C. & P. 241.

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APPENDIX (A).

THE ordinance referred to at the end of the Introduction was enacted in the mayoralty of Adam Bury, 39 Edw. 3 (1365). It may not be uninteresting to the reader to see a copy of this curious document. It is therefore added in its original form; together with a confirmation of it by the Mayor and Aldermen of London.

The Ordynaunce of the Cite for Tenauntz of Houses, what thingis they shall not remeue att theyr departinge.

Intrat' in libro cum littera G. folio c. lxxiiij. tempore Ade Bury tunc Majoris A° Regz Edwardi Tercij. xxxix.

ORDINATUM est quod si aliquis cōdicat teñtm vel domos in ciuitate Londen vel in subbarbijs eiusdem ciuitatis tenendum ad terminum vite vel annorum vel de anno in annum vel de q'rterio in q'rteriū, si huius inteneus aliqua appencia seu alia asiamenta in huiusmodi tentiuz vel in domibus fecerit, eciam ad mereniuz dcōz tñtoz vel domos clauos ferios aut ligneos attachiamēt nōlicebit tali tenēti huiusmodi appēcicia seu asiamenta in fine terminū vel aliquo alio tempore abradicare sed semper permanebūt dño soli vt percelli eiusdem.

A Confirmacion of the same Acte be the Mayre and Aldermen.

WHERE as nowe of late amonge dyuers people was sprongen a mater of dowl vpon the most olde custume had & vsed in this cyte of Lōdon of suche thingis which by tenātis terme of lyf or yeris ben affixed vnto houses wythout speciall licence of the ownar of the soyle, whether they owe or remayne vnto the ownar of the soyle as percell of y^e same or ellis wheder it shalbe lefull vnto such tenauntis on thende of her terme, all such thingis affixed to remeue.

Wherupon olde bokis seen, and many recordis olde processis and iugementis of the sayde cyte, it was declared by the Mayre and th' Adermen for an olde prescribed custum of the cyte aforesayde. That alle suche easmentis fixed vnto houses or to soile by suche tenement; wythout special and expresse lycence of the ownar of the soile. Yf they be affixed w^t nayles of irne or of tree as pentises, glasse lockis benchis or ony suche other, or of ellis yf they bee affixed w^t mortar or lyme or of erther or ani other mortar as forneis leedis candorus chemyneis corbels pauemettis or such other, or ellis yf plant; be roetid in the ground as vynes trees graffe stoũk; trees of frute &c. yt shal not be leeful vnto such tenauntis in y^e ende of her terme or any other tyme therin nor any of them to put away moue or pluk vp in any wyse, but y^t they shall alwey remayn to the owner of the soyle as percels of y^e same soyle or tenement.

See *Arnold's Chronicle*, fol. 137, 138.

It is worthy of remark that Mr. Serjeant Hill in his valuable MS. notes to the 15th vol. of Viner's Abridgment, in the Library of Lincoln's Inn, p. 43, notices this document; and he calls it an Ordinance of *Parliament*. He refers to Entick's History of London, vol. i. p. 258, where it is in like manner called an Ordinance of Parliament. Entick appears to have extracted his account from Maitland's History, vol. i. book 1. p. 131; but it is observable that it is there described simply as an Ordinance. The document in question appears to be merely an Ordinance of the citizens of London, enacted at one of their deliberative courts, or general assemblies; and afterwards confirmed by an act of the Court of Mayor and Aldermen. It can hardly be considered an original act of the Common Council. For it was not till the reign of Edward III. that an attempt was first made towards the regular constitution of the Court of Common Council as a legislative and representative body; and it was not fully established upon the present representative system till the reign of Richard II. As to the nature of an ordinance, see 4 Inst. 25.

APPENDIX (B).

General Rules respecting Fixtures between Landlord and Tenant; pointing out what Fixtures a Tenant may take away; the Time within which they must be removed, &c. &c.

I. A TENANT may take away certain things which he has himself affixed to the premises for the purposes of his *trade and manufacture*. This rule may be illustrated by the following examples of removable articles, which are to be met with in decided cases, and which have been noticed in Part I., Chap. II., Sect. 1 :—

- (A) Vessels and utensils of trade, such as furnaces, coppers, brewing vessels, fixed vats, salt-pans, tables, partitions, and the like (*ante*, pp. 45, 49, 57).
- (B) Machinery in factories, breweries, collieries, mills, &c.; as steam-engines, cider-mills, and the like (*ante*, pp. 51, 55, 57).
- (C) Certain erections for trade, such as a varnish house built on plates laid on brick-work; or sheds formed of uprights rising from a foundation of brick-work. And so, it seems, a building which is merely an accessory to a removable thing, such as an engine-house built merely to protect a steam-engine (*ante*, pp. 58, 60, 63).

By reference to these particular instances, the tenant must be guided as to his right to remove the ordinary articles which he puts up in the course of his trade (*a*).

(*a*) The following may be cited among the numerous examples of erections which ordinarily occur in practice, and which seem to be of the nature of trade-fixtures:—the plant of a brewer, distiller, &c.; pumps, engines, cisterns, cranes, forges, presses, &c.; shop-fittings,

such as counters, desks, drawers, shelves, partitions, glass-fronts, gas-pipes, &c.; iron safes, closets or repositories; with other things of the same description, as usually erected in manufactories, shops, or warehouses, for the convenience of trade.

But it has never been established that a tenant may remove *substantial* and *extensive* additions to the premises, although he may have built them exclusively for the convenience of his trade; such as lime-kilns, pottery or brick-kilns, wind or water-mills, work-shops, store-houses, and other buildings of that description (*ante*, p. 62). Nor, indeed, must it be assumed that in all cases trade erections, even of a less substantial nature than these, are removable by a tenant. Thus, whenever the removal of the property would materially injure the freehold to which it is attached, it may safely be considered that the tenant has no right to inflict that injury upon his landlord (*ante*, p. 69 *et seq.*). And so, where the structure or substance of the thing itself will be destroyed in taking it away, it must be a matter of considerable doubt whether the tenant has a right to remove it (*ante*, pp. 65, 71).

II. Besides trade-fixtures, a tenant may also remove certain fixtures which he has put up at his own expense, *for the ornament and furniture of his house*. And under this heading, certain articles are comprehended, which are not strictly of an ornamental nature, but which are set up by the tenant for ordinary *domestic use and convenience*.

Of the first class, the following examples are found in the authorities:—

Hangings, tapestry, and pier-glasses, nailed or screwed to the walls or panels of a house (see *ante*, pp. 8, 116 note (i)); *ornamental* chimney-pieces, whether of marble or other material; wooden cornices; marble slabs; window blinds, and the like; and even, it has been said, wainscot fixed to the walls by screws (*ante*, pp. 107—109, 114, 119—121).

But articles of this description can be removed only where they are so attached to the premises, as not to have become part of the substance and fabric of the house. For it appears that a tenant cannot remove an article, though put up for ornament, if he has so substantially united it to the house, that its removal would materially impair the freehold (*ante*, pp. 118, 123 *et seq.*). So neither will he be allowed to take away erections which may be considered as permanent additions or improvements to the estate (*ante*, p. 122). Thus it has been held, that he is not entitled to pull down a conservatory built on a brick foundation, and intimately connected with the dwelling-house (*ante*, p. 110); nor even a greenhouse erected on brickwork, although standing apart in a garden and in no way affixed to the house (*ante*, p. 113).

With respect to the second class of fixtures, viz., those put up by a tenant for *ordinary use and convenience*, the following articles, to be met with in the authorities, may be enumerated as being amongst those removable by a tenant (a) :—

Grates, ranges, and stoves fixed in brickwork; iron backs to chimneys; beds fastened to the ceiling; bookcases (but see p. 8); bells; fixed tables; furnaces, coppers; pumps; iron-fences and hurdles; mash-tubs and water tubs; cupboards fixed with holdfasts; clock cases (but see p. 8); iron ovens; and the like; and even, it seems, a system of heating pipes in an irremovable green-house, if they are connected only by screws (*ante*, pp. 59, 106, 108—110, 113, 114, 247).

But with respect to these fixtures, also, it is particularly to be observed, that they must be so affixed and connected with the premises as to occasion but little damage in their removal; otherwise the tenant will not be allowed to take them away (*ante*, p. 118 *et seq.*).

III. A tenant in *husbandry* had not formerly, and, except in cases provided for by statute, has not now, the same privilege as a tenant in trade. For he cannot take away things which he has affixed to the demised premises at his own expense, *for purposes which are merely agricultural*. Thus, it was long since held, that a tenant could not remove a beast-house, carpenter's-shop, fuel-house, cart-house, pump-house, or fold-yard wall, erected for the use of his farm, *even though he left the premises exactly in the same state as he found them on his entry* (*ante*, p. 73).

The application of this general rule has, however, been considerably limited by the Legislature in the statutes 14 & 15 Vict. c. 25, s. 3; 38 & 39 Vict. c. 92; 46 & 47 Vict. c. 61 (see *ante*, p. 77 *et seq.*). For a summary of the general position of an agricultural tenant at the present day, the reader is referred to p. 96 of the text.

But the above common law rule was confined to articles of a *strictly agricultural* nature. For, if the object and purpose of an erection has also relation to a *trade* of any description,

(a) The following examples are of frequent occurrence in practice; and although there has been no legal decision respecting them, they seem to be of the same nature as the instances mentioned in the text:—shelves, cabinets, &c.,

planned and fitted; dressers, presses, bins; fixed cisterns and sinks; iron chests; turret and other [see *ante*, p. 118] and other and con-

the tenant may remove such erection, notwithstanding it is the means or instrument of obtaining the profits of the land ; subject, however, to the former observations as to the extent and character of the addition. Thus, a tenant may take away a mill for making cider ; or machinery for working mines and collieries ; or, as it would seem, utensils set up for manufacturing salt from springs upon the demised premises. Fixtures of this description belong to a class of cases which have been denominated *mixed cases*. With respect to the right of removal in these instances, the reader is referred to Part I., Chap. II., Sect. 3 (p. 97 *et seq.*).

IV. Tenants of *nursery gardens and grounds* are legally entitled, before the end of the term, to remove and dispose of the young trees, shrubs, &c., which they have planted for the purpose of sale. And so also fruit trees, though of full bearing age, if they are nursery trees such as the tenant might fairly deal with in his trade (*ante*, p. 100). A nurseryman cannot, however, at the close of his term, plough up strawberry-beds in full bearing, without any reasonable object in view (*ante*, p. 101). There seems to be no reason why a nurseryman should not be allowed to take down hot-houses, green-houses, forcing-pits, &c., which he has built during his tenancy, for the purposes of his business, although a private person could not do so (as to this see *ante*, p. 103).

The Agricultural Holdings Act, 1883, confers upon *market-gardeners* a right to compensation for the erection of buildings, the making of gardens, &c. ; and, under and subject to the provisions of the same statute, such persons may, in some cases, claim to remove buildings and fixtures, but not things growing in the soil (*ante*, pp. 80 *et seq.*, 101).

A *private person* is not at liberty to sell and remove young fruit trees, shrubs, &c., planted by himself, not in the way of trade ; nor even a border of box ; nor flowers (*ante*, p. 102).

V. A tenant must remove his fixtures *before the expiration of his tenancy* ; for he is not at liberty to insist on his claim afterwards (*ante*, p. 127 *et seq.*). This must be considered as the rule in general cases. But if a tenant continues in possession of the premises after the end of his term, it seems that he may be entitled, during such further period of possession, as he holds the premises *under a right still to consider himself as tenant*, to remove the fixtures which he had previously neglected to take away. As, however, there is considerable difficulty in saying what are the cases falling within this qualification of the general rule, it will be well to refer to the pages

of the text, where the subject has been fully discussed. (See *ante*, p. 134 *et seq.*).

If the interest which the tenant has in the demised premises is uncertain, as, if he is tenant strictly at will, or tenant *pour auter vie*, &c., in this case he will, in general, be allowed a reasonable time to remove his fixtures after the actual determination of his tenancy (*ante*, p. 143).

VI. The several rules laid down in the foregoing pages are alike applicable, whether the tenant holds by lease under seal, or by parol demise. With respect also to the description of fixtures which a tenant is authorized to remove as against his landlord, there is no distinction whether the party is lessee for life, for years, or merely tenant from year to year, &c.

But in applying these rules to practice, it should be observed, that the rights both of landlord and tenant, in respect of fixtures, are frequently varied and controlled by the *express terms of the demise*, or by the circumstances under which the tenancy was originally created. Thus, if a tenant covenants to repair the demised premises and all erections, &c., built, or that may be *afterwards* built thereon, such a covenant will prevent the tenant from taking down an erection put up by himself, although it was intended for the purpose of trade, and might have been removed but for the covenant in question. (See *ante*, Part I., Chap. II., Sect. 6, p. 145 *et seq.*).

Therefore, before a tenant severs an article from the freehold, it is necessary that he should examine his claim, not only with reference to the general law of fixtures, but also as it may be affected by any covenant or stipulation, express or implied, in his lease, &c. So, if a tenant, at the expiration of his term, is desirous of renewing it, or if he enters into any fresh agreement respecting the premises, he should be careful to make a stipulation as to his fixtures; otherwise, by making such fresh engagement, he may lose his property in them altogether (*ante*, p. 155 *et seq.*).

VII. A tenant may so put up machinery, or so construct an erection or building, that it will not be considered to be affixed to the freehold in contemplation of law. And then, whatever its purpose may be, and however substantial it is in itself, the landlord will have no right to it at the end of the term. For, unless a thing is absolutely attached to the realty, by being let into the ground, or united to the freehold by means of nails, screws, bolts, mortar, or the like, the law regards it as a mere loose and moveable chattel (*ante*, p. 2).

Thus, if a tenant erects a barn, granary, stable, or any other building, upon blocks, rollers, staddles, stilts, or pillars, the landlord is not entitled to it as part of his freehold. So, vessels or utensils supported on brick-work, frames, or horses standing on the ground; metal flooring plates, laid on the surface of the ground; tram-plates fastened to sleepers not embedded in the soil; machines placed in, but not affixed to, prepared receptacles in the ground (*ante*, p. 3 *et seq.*); so also of carpets, mirrors, pictures, &c., attached in the ordinary way (*ante*, p. 7).

By adopting, therefore, these or other similar modes of construction, a tenant may not only make valuable additions to his premises with perfect safety, but also avoid the effect of a covenant in his lease respecting the repair of buildings, &c., erected by himself after the commencement of the term.

It will frequently be found a great security to tenants, and may avoid litigation, to have special clauses inserted in their leases, &c., as to the disposal of their fixtures at the end of their term. It may be provided by these clauses that the tenant shall be allowed to remove his fixtures within a reasonable time after the end of his term; or that he may leave them on the premises to be valued to an incoming tenant; or that the landlord shall take them at an appraisement to be made in a manner specified. And these provisions are particularly recommended where the tenant intends to make considerable improvements and additions to the premises; or where his fixtures are, from the nature of his occupation, of a valuable description, as in collieries, breweries, &c.; or where they are in any manner connected with the produce and profits of land, as in the instance, particularly, of farm leases (*a*).

(*a*) For precedents of leases of collieries, &c., see Davidson, *Prec.* vol. v., pt. 1. For precedents of covenants as to fixtures or improvements in the lease of a house, see

id., pp. 155, 156, 163 (3rd ed.). For a precedent of a lease of a house and fixtures comprised in a schedule, see 2 Prideaux, *Prec.* p. 50 (12th ed.).

APPENDIX (C).

Appraisement of Fixtures.

A WRITTEN valuation or appraisement of fixtures, must have the proper stamp required by statute, otherwise it cannot be received in evidence. This is regulated by the Stamp Act, 1870 (33 & 34 Vict. c. 97, ss. 3, 16, 17, 38), by which the following duties are imposed upon appraisements or valuations of any property or of any interest therein, or of the annual value thereof, or of any dilapidations, or of any repairs wanted, or of the materials, &c., used in any building, or of any artificers' work whatsoever:—

				£.	s.	d.
Where the amount of the appraisement or valuation						
does not exceed £5				0	0	3
Exceeds £5, and does not exceed £10				0	0	6
„	10	„	20	0	1	0
„	20	„	30	0	1	6
„	30	„	40	0	2	0
„	40	„	50	0	2	6
„	50	„	100	0	5	0
„	100	„	200	0	10	0
„	200	„	500	0	15	0
„	500	„		1	0	0

The above Act, however, exempts from stamp duty appraisements, &c., made for, and for the information of, one party only, and not being in any manner obligatory as between parties either by agreement or operation of law; or made for the purpose of ascertaining the legacy or succession duty payable in respect of the property appraised or valued. (See, too, *Atkinson v. Fell*, 5 M. & S. 240; *Jackson v. Stopherd*, 2 Cr. & M. 361.)

Where nothing but the mere value of fixtures is referred to appraisers, for the purpose of ascertaining the amount due between two parties, it is sufficient if the written valuation has an appraisement stamp, and an award stamp is not necessary. (*Leeds v. Burrows*, 12 East, 1; *Perkins v. Potts*, 2 Chit. 399; and see *Bos v. Helsham*, L. R., 2 Ex. 72.) But if, in ascertaining the value of the property, the matter assumes the character of a judicial inquiry, it being intended that a decision shall be arrived at upon evidence adduced by the parties, such

decision may properly be considered as an award. (*Re Hopper*, L. R., 2 Q. B. 367.)

An inventory of fixtures appraised and signed by brokers, whom the landlord and tenant appoint for the purpose, will, if the tenant by his conduct adopts it, enable the landlord to recover the price of them as upon an account stated, without giving further evidence of the contract for the sale of the articles or of their value. (*Salmon v. Watson*, 4 Moore (C. P.), 73; and see *ante*, p. 385.)

And it would seem, that where fixtures are purchased and possession delivered of them upon such an inventory and appraisal, it amounts to a part performance, sufficient to take an agreement for the sale of premises out of the Statute of Frauds. (*Bowers v. Cator*, 4 Ves. 91; and see *ante*, p. 332.)

As to an action lying against appraisers for incompetence, see *Jenkins v. Betham*, 24 L. J., C. P. 94.

As to stamps, see further, *ante*, p. 335.

APPENDIX (D).

*Miscellaneous Rules and Directions respecting the Demise,
Purchase, Valuation, &c., of Fixtures, between Landlord
and Tenant, and between Outgoing and Incoming Tenants, &c.*

1. *Between Landlord and Tenant.*

Upon the demise of a house, &c., it is usually agreed between the landlord and the tenant, that "*the fixtures are to be taken at a valuation.*" This is the form in which questions of fixtures very commonly arise in practice; and a broker is then called in to determine what specific articles are intended, and the amount which the tenant is accordingly to pay. Upon an agreement of this kind, the proper construction, in general, appears to be, that all such articles are to be valued between the parties, as a tenant would in ordinary cases be entitled to remove under the law of fixtures, if he put them up himself during the term.

But when a stipulation of this kind occurs in a covenant by which a landlord agrees to make an allowance for the fixtures at the end of the term, it would seem that those articles should alone be valued at the conclusion of the lease, which were paid for by the tenant on entering upon the premises. For it is conceived that the covenant would not extend to any new erections that have been made by the tenant; unless, perhaps, where they have been merely substituted for others which before formed a part of the premises.

But, in all these cases, the valuation should be made with reference to what appears to be the real meaning and intention of the parties, as collected from the language of the whole agreement, the custom of the district, and the general nature of the transaction.

Upon agreements between landlord and tenant for the purchase of fixtures merely, it is not requisite that the contract should be in writing, as such agreements do not fall within the provisions of the Statute of Frauds (see *ante*, p. 328 *et seq.*). But where there is a written agreement between parties for the sale and purchase of fixtures, it cannot be received in

evidence unless it is stamped with an agreement stamp, if the amount is 5*l.* and upwards (*ante*, p. 336).

Fixtures are considered so much an integral part of a house that upon an agreement for a lease, &c., if nothing is said as to the fixed articles in the house, they must be considered as thrown into the bargain, and a compensation for their use included in the rent of the premises (*ante*, p. 274 *et seq.*, 290. note (*d*)). Hence it is a necessary caution in leases, assignments, and other conveyances, when it is intended that the fixtures should be valued and paid for separately from the premises, that this intention should be clearly expressed, and an enumeration of the fixtures made in the instrument of conveyance, by schedule or otherwise.

Where a tenant has put up fixtures which he intends to remove, and at the close of his tenancy renews his term, or takes a new interest in the premises, or makes any other engagement with his landlord in respect of the same, he must be careful to reserve his right to take away his fixtures. For by entering into such agreements without expressly stipulating about the removal of his fixtures, he may sometimes lose his property in them altogether (*ante*, p. 155 *et seq.*).

In removing fixtures, a tenant must do as little injury as possible to the demised premises; and, as far as it is in his power, should replace every thing in its former situation. It is sufficient, however, if he leaves the premises in such a state as is most beneficial to those coming after him. If he occasions any unnecessary injury to the premises in taking away the fixtures, the landlord may compel him to make it good (*ante*, pp. 69, 93, 124).

In leases, &c., of mills, breweries, &c., the fixed machinery and utensils, which form a very valuable part of the lease, are frequently demised to the tenant together with the premises. In these cases, the tenant will be bound, under a general covenant to repair, not only to keep in proper condition the buildings, &c., but also every species of article annexed to the premises at the commencement of his lease. And in the absence of a special covenant, the liability of keeping them in tenantable repair will result from the relation of landlord and tenant. It is considered, however, that the tenant is bound to repair the fixed articles and utensils only so long as they are capable of restoration; and that he could not be called upon to substitute others in lieu of those which are worn out in the ordinary use of them. If the tenant himself puts up new fixtures in the place of those which are worn out, and incapable

of further repair, he will not, it seems, be entitled to remove these at the end of the term (*ante*, p. 152).

The qualified property which, in these cases, a tenant has in the fixed articles demised to him together with the premises, subsists only, as against the landlord, as long as they continue annexed to the freehold. So that, if the tenant severs them during the term, they instantly belong to the landlord, and he may maintain an action for them as personal chattels, even against the tenant himself (*ante*, pp. 367 *et seq.*, 379).

2. *Between Outgoing and Incoming Tenants, &c.*

When it is agreed between an outgoing and incoming tenant, that the fixtures on the premises are to be taken at a valuation, the broker should value such things to the incoming tenant, as, under the general law of fixtures, are removable between a landlord and his tenant. And all fixed articles upon the premises which fall within this description should be included in the valuation, although they may in fact have been originally purchased of the landlord by the outgoing tenant. But the outgoing tenant cannot insist on any thing being appraised which, as against his landlord, he is not legally authorized to sever; nor will he be entitled to any allowance for the same, notwithstanding he may have put them up at his own expense. And with respect to those things which are generally removable by a tenant, if any of these were affixed to the premises prior to the demise to the first tenant, and were not purchased by him of his landlord, or if the removal of them would contravene any proviso, covenant, or agreement in the lease, they ought not to be valued to the incoming tenant.

If the property purchased by the incoming from the outgoing tenant, turns out in fact to belong to the house, and was scheduled in the original lease, the incoming tenant may recover the sum he paid for it, in an action against the outgoing tenant for money had and received. And in such an action, it will be no defence that the outgoing tenant did not know that the articles belonged to the landlord, and that he bought them himself
have a remedy over
(*Robinson v. Andert*
note (d), 385).

A party taking an
lease is nearly expiri

pay the full value for the fixtures, unless it is ascertained that the landlord will consent to a valuation of them at the end of the term. For otherwise, as they must be removed before the lease expires, and when severed would be sold at considerable loss, the *superior landlord* would have it in his power to press a sale to himself under terms very disadvantageous to the tenant.

So also, in taking an underlease of premises, the party should consider the length of time which the lease of the mesne landlord has to run. For in case his reversion is of short duration, he will not have a sufficient inducement to repurchase the fixtures at their full value; and the underlessee will then be compelled to dispose of them at a loss, unless he has stipulated for a valuation of them at the end of his term. Again, an underlessee should be careful to ascertain whether the mesne landlord has entered into any covenant with the superior landlord, affecting the right to remove fixtures which may be placed upon the demised premises; for, if so, the underlessee may be prevented from removing fixtures affixed by him during his term, although by his contract with the mesne landlord he is entitled to do so (see *ante*, p. 155, note (r)).

Where an incoming tenant enters into an arrangement with the outgoing tenant for the purchase of his fixtures, he should require that the landlord be made privy to the transaction. For if the landlord is no party to the agreement, he may afterwards insist that as the articles were not actually removed during the outgoing tenant's term, they fell in with the lease, and that the second tenant took them only as part of the demised premises, and is, therefore, not entitled to remove them (*ante*, p. 160, note (n)).

In like manner, if a tenant is desirous of leaving his fixtures at the end of his term to be valued to an incoming tenant, it is absolutely necessary that he should obtain the consent of the landlord, before he quits possession of the premises. If, however, there is a covenant in his lease that the fixtures shall remain for the benefit of the incoming tenant, on paying their value, it would appear that the effect of this agreement is to give him a right of leaving his fixtures till he can sell them to the succeeding party, and that his interest in them remains in the meantime (*ante*, pp. 141, 142, 162).

As to the effect of custom in questions between outgoing and incoming tenants, see *ante*, pp. 69, 163.

APPENDIX (E) (a).



THE following remarks upon the decision of the Court of King's Bench in the case of *Elwes v. Maw* (3 East, 38) may be of interest to the reader, although it is not meant thereby to intimate any doubt as to the validity of that decision as an authority at the present day.

It has been shown in Chap. II. § 1 (*ante*, p. 45 *et seq.*), that the passage there cited from the Year Book (20 H. 7), upon which, it appears, much reliance was placed by Lord Ellenborough, C. J., in *Elwes v. Maw*, in order to prove that an exception from the general rule of law obtained in early times specifically in favour of trade, is very far from having any such exclusive operation; and that, on the contrary, the general meaning of the expressions there found must be greatly narrowed and violated, not to include other erections besides those erected for trade or manufacture. And this observation applies with equal, if not greater, force to the rest of the early decisions; indeed, the instances mentioned in some of them, as paling, posts, &c., removable by a lessee, seem rather in the nature of agricultural erections (*b*). Neither Lord Hardwicke nor Lord Mansfield, in their judgments in *Lawton v. Lawton*, *Lord Dudley v. Lord Warde*, and *Lawton v. Salmon*, intimate any opinion that agricultural erections are subject to a different rule from that which prevails in respect of trading erections. Lord Hardwicke considered the collieries as profits of land, and held the fire engines to be removable, notwithstanding they were accessories to the enjoyment of the real estate. He also approved of the decision of Comyns, C. B., respecting the cider-mill, "although," as he observed, "cider is part of the profits of the real estate" (*c*). Moreover, he remarks that the general ground on which the Courts proceeded in relaxing the old rule in favour of tenants for life was, that it is for the benefit of the public to encourage such tenants to do what is

(a) See *ante*, p. 76.

(b) *Vide* Br. Ab. Tit. Waste, pl. 104; *Id.* Tit. Chattels, pl. 7. And see Yr. Bk., 21 H. 7, p. 26; *Cooke's Case*, Moore, 177; *Day v. Bisbitch*, Cro. Eliz. 374.

(c) Lord Ellenborough takes the same view of these cases, and admits that the erections were put up in part for the enjoyment of the profits of land. See 3 East, at p. 54.

advantageous to their estates. So, Lord Mansfield in the case of *Laiton v. Salmon*, although he regarded the salt-pans as accessory to land (in which also Lord Ellenborough concurred and said that they were not considered as the means or instrument of carrying on trade), yet thought that such article would be removable by a tenant. And it must be presumed that his Lordship did not intend to confine his observations, as to the salt-pans being accessory to land, to the case before him, which was between heir and executor, for it would be a difficult proposition to maintain, that an article should be considered an accessory to land as between heir and executor, but an accessory to trade as between landlord and tenant. Again in *Fitzherbert v. Shaw*, Mr. Justice Gould is reported to have been clearly of opinion at the trial, that a tenant was entitled to take away a stable, a shed, and some posts and rails; and it may, therefore, at least be inferred from this opinion, that the principle on which the case of *Elwes v. Maw* was decided, was not perfectly recognized, or generally understood, in the time of this learned judge. And so in the case relating to the barn, before Treby, C. J., it is certainly true, as observed by Lord Ellenborough, that, owing to the construction of the article, it did not come within the law of fixtures; but Mr. Justice Buller, in his comment upon this case, treats the barn as if it had been actually fixed, and expresses a decided opinion, that such a building would be removable, on the general ground of the exception in favour of tenants. The case of *Dean v. Allalley* has not, perhaps, such a distinct reference to agriculture as to amount to an express authority for the removal of agricultural erections. Yet, it should be observed that the concluding part of Lord Kenyon's judgment in that case extends the privilege to trade erections, or (disjunctively) to such as were constructed like the barns in question. Moreover, the description given of these buildings in the M.S. note cited by counsel in *Elwes v. Maw*, as well as their name, and the purposes for which such erections are usually made, confirm the supposition that Lord Kenyon's opinion may be considered an authority for the removal of at least some species of agricultural erections; and indeed Lord Ellenborough seems to have so treated it in one part of his judgment. That Lord Kenyon did assign a very extensive latitude to the rule in favour of trade fixtures, appears from his observations in the subsequent case of *Penton v. Robart*.

According to this view of the authorities antecedent to the case of *Elwes v. Maw*, it seems difficult to acquiesce in the opinion expressed by Lord Ellenborough, that the doctrine sought to be established by the defendant "was contrary to

the uniform current of legal authorities." The true state of the question (as observed in one part of his Lordship's judgment) appears rather to be, that no adjudged case had then gone the length of establishing that buildings subservient to purposes of agriculture, as distinguished from those of trade, were removable by the tenant who built them during his term. But admitting that no case is to be found among the more ancient authorities in favour of agricultural erections, it should be recollected that the mode of agriculture pursued in early times was extremely simple, and that the implements of husbandry then in use were defective and of very little value: inasmuch as, for a period subsequent to that over which the Year Books extend, the English may rather be considered a pastoral than an agricultural nation (*d*).

But the rule laid down in the case of *Elwes v. Maw* appears liable to further objection, on account of the narrow grounds upon which it rests. It is universally allowed that the privilege in respect of trade is not confined to trade according to the strict meaning and construction of former Bankruptcy Acts; and it would seem that many branches of husbandry have a strong affinity to trade in an enlarged sense of the expression; for instance, the dealings of a farmer in stock, wool, and bark, &c., the making of charcoal, growing and preparing flax, or the manufacturing of hoops, which, in some of the counties of England, is a considerable source of the profits of a farm. In this view of the subject, the making of cheese on a farm, or the preparing of grain for market by means of a threshing-machine, may, with equal reason, be considered a manufacture or a species of trade, as the making of cider from the produce of an orchard annually renewing (*e*).

But the strongest objection to the distinction established by the case of *Elwes v. Maw* is, that the principle on which trade fixtures are permitted to be removed, applies with equal reason to agricultural erections. The principle of the trade cases is

(*d*) *Vide* Strutt's Antiquities, vol. ii., on the Husbandry of the English. And see Fortescue de Laudibus Legum Angliæ, ch. 29.

(*e*) Lord Ellenborough considers the cider-mill as an accessory to a species of trade. The manufacturing of cider and perry is an object of British husbandry, which in our fruit countries is of great importance. In the county of Worcester, where it seems the question in the *Cider Mill Case* arose, there is upon most of the

farms a mill for the purpose of making cider from the fruit growing in the orchards and fields of the farm. The cider is made by the farm-tenants for the consumption of their families, and for the purpose of sale. In some instances the cider is sold directly from the mill and press, in the state of expressed juice, to persons who collect it from the different farms, and afterwards manufacture it for market.

that of public policy, it being for the benefit of the public to encourage tenants to make useful additions to their premises, and to avail themselves of modern improvements in arts and manufactures. Husbandry, according to present practice, has become a scientific pursuit; the increased produce and profits of the land depend upon the expenditure of capital, and the exercise of intelligence in the improved modes of cultivation; and according to these improved modes much valuable machinery is employed, which requires to be substantially affixed to the premises: and it is obvious that the industry of the farmer is more productive in proportion to the better disposition of his buildings, and the facilities he possesses for rearing and keeping stock, and storing and preparing his produce. If, therefore, the principle of the indulgence to tenants be deemed of beneficial tendency, as it affects the interests and protects the improvements of the manufacturer, the distinction must have been very refined upon which it was thought politic to deny the same advantages to the agricultural tenant. Indeed, Lord Ellenborough seems to have felt the force of this objection; and it is observable that, in one part of his judgment, he rested his argument against agricultural tenants on a more technical ground; for he said that machinery and erections might be removed when they were accessory to trade, because trade is a matter of a personal nature, and not real or local. But as this is a principle which obviously embraces a variety of claims which have no reference to trade, it would make the case of the agricultural tenant one of still greater hardship, than if the less comprehensive rule of confining the exception strictly to trading fixtures were insisted upon.

From the above remarks the reader may be led to think that the decision in *Elwes v. Maw* drew, for the first time, an unnecessary distinction between trade fixtures and those for agricultural purposes. This distinction, however, the Legislature by the Agricultural Holdings (England) Act, 1883, has now gone far to abolish.

APPENDIX (F).

THE AGRICULTURAL HOLDINGS (ENGLAND) ACT, 1883.

[46 & 47 VICT. c. 61.]

An Act for amending the Law relating to Agricultural
Holdings in England. [25th August, 1883.]

BE IT ENACTED by the Queen's most Excellent Majesty, by
and with the advice and consent of the Lords Spiritual and
Temporal, and Commons, in this present Parliament assembled,
and by the authority of the same, as follows :

PART I.—IMPROVEMENTS.

Compensation for Improvements.

1. Subject as in this Act mentioned, where a tenant has made on his holding any improvement comprised in the First Schedule hereto, he shall, on and after the commencement of this Act, be entitled on quitting his holding at the determination of a tenancy to obtain from the landlord as compensation under this Act for such improvement such sum as fairly represents the value of the improvement to an incoming tenant: Provided always, that in estimating the value of any improvement in the First Schedule hereto there shall not be taken into account as part of the improvement made by the tenant what is justly due to the inherent capabilities of the soil.

General right
of tenant to
compensa-
tion.

As to Improvements executed before the Commencement of Act.

2. Compensation under this Act shall not be payable in respect of improvements executed before the commencement of this Act, with the exceptions following, that—

Restriction as
to improve-
ments before
Act.

- (1) Where a tenant has within ten years before the commencement of this Act made an improvement mentioned in

38 & 39 Vict.
c. 92.

the third part of the First Schedule hereto, and he is not entitled under any contract, or custom, or under the Agricultural Holdings (England) Act, 1875, to compensation in respect of such improvement; or

- (2) Where a tenant has executed an improvement mentioned in the first or second part of the said First Schedule within ten years previous to the commencement of this Act, and he is not entitled under any contract, or custom, or under the Agricultural Holdings (England) Act, 1875, to compensation in respect of such improvement, and the landlord within one year after the commencement of this Act declares in writing his consent to the making of such improvement, then such tenant on quitting his holding at the determination of a tenancy after the commencement of this Act may claim compensation under this Act in respect of such improvement in the same manner as if this Act had been in force at the time of the execution of such improvement.

As to Improvements executed after the Commencement of Act.

Consent of
landlord as to
improvement
in First
Schedule,
Part I.

3. Compensation under this Act shall not be payable in respect of any improvement mentioned in the first part of the First Schedule hereto, and executed after the commencement of this Act, unless the landlord, or his agent duly authorised in that behalf, has, previously to the execution of the improvement and after the passing of this Act, consented in writing to the making of such improvement, and any such consent may be given by the landlord unconditionally, or upon such terms as to compensation, or otherwise, as may be agreed upon between the landlord and the tenant, and in the event of any agreement being made between the landlord and the tenant, any compensation payable thereunder shall be deemed to be substituted for compensation under this Act.

Notice to
landlord as to
improvement
in First
Schedule,
Part II.

4. Compensation under this Act shall not be payable in respect of any improvement mentioned in the second part of the First Schedule hereto, and executed after the commencement of this Act, unless the tenant has, not more than three months and not less than two months before beginning to execute such improvement, given to the landlord, or his agent duly authorised in that behalf, notice in writing of his intention so to do, and of the manner in which he proposes to do the intended work, and upon such notice being given, the landlord and tenant may agree on the terms as to compensation or otherwise on which the improvement is to be executed, and in the event of any such agreement being made, any compensation payable thereunder shall be deemed to be substituted

for compensation under this Act, or the landlord may, unless the notice of the tenant is previously withdrawn, undertake to execute the improvement himself, and may execute the same in any reasonable and proper manner which he thinks fit, and charge the tenant with a sum not exceeding five pounds per centum per annum on the outlay incurred in executing the improvement, or not exceeding such annual sum payable for a period of twenty-five years as will repay such outlay in the said period, with interest at the rate of three per centum per annum, such annual sum to be recoverable as rent. In default of any such agreement or undertaking, and also in the event of the landlord failing to comply with his undertaking within a reasonable time, the tenant may execute the improvement himself, and shall in respect thereof be entitled to compensation under this Act.

The landlord and tenant may, if they think fit, dispense with any notice under this section, and come to an agreement in a lease or otherwise between themselves in the same manner and of the same validity as if such notice had been given.

5. Where, in the case of a tenancy under a contract of tenancy current at the commencement of this Act, any agreement in writing or custom, or the Agricultural Holdings (England) Act, 1875, provides specific compensation for any improvement comprised in the First Schedule hereto, compensation in respect of such improvement, although executed after the commencement of this Act, shall be payable in pursuance of such agreement, custom, or Act of Parliament, and shall be deemed to be substituted for compensation under this Act.

Reservation
as to existing
and future
contracts of
tenancy.

Where, in the case of a tenancy under a contract of tenancy beginning after the commencement of this Act, any particular agreement in writing secures to the tenant for any improvement mentioned in the third part of the First Schedule hereto, and executed after the commencement of this Act, fair and reasonable compensation, having regard to the circumstances existing at the time of making such agreement, then in such case the compensation in respect of such improvement shall be payable in pursuance of the particular agreement, and shall be deemed to be substituted for compensation under this Act.

The last preceding provision of this section relating to a particular agreement shall apply in the case of a tenancy under a contract of tenancy current at the commencement of this Act in respect of an improvement mentioned in the third part of the First Schedule hereto, specific compensation for which is not provided by any agreement in writing, or custom, or the Agricultural Holdings Act, 1875.

Regulations as to Compensation for Improvements.

**Regulations
as to com-
pensation for
improvements.**

6. In the ascertaining of the amount of the compensation under this Act payable to the tenant in respect of any improvements there shall be taken into account in reduction thereof:

a Any benefit which the landlord has given or allowed the tenant in consideration of the tenant executing the improvement; and

b In the case of compensation for manures the value of the manure that would have been produced by the consumption on the holding of any hay, straw, roots, or grass crops sold off or removed from the holding within the last two years of the tenancy or other less time for which the tenancy has endured, except as far as a proper return of manure to the holding has been made in respect of such produce so sold off or removed therefrom; and

c Any sums due to the landlord in respect of rent or in respect of any waste committed or permitted by the tenant, or in respect of any breach of covenant or other agreement connected with the contract of tenancy committed by the tenant, also any taxes, rates, and tithe rent-charge due or becoming due in respect of the holding to which the tenant is liable as between him and the landlord.

There shall be taken into account in augmentation of the tenant's compensation—

d Any sum due to the tenant for compensation in respect of a breach of covenant or other agreement connected with a contract of tenancy and committed by the landlord.

Nothing in this section shall enable a landlord to obtain under this Act compensation in respect of waste by the tenant or of breach by the tenant committed or permitted in relation to a matter of husbandry more than four years before the determination of the tenancy.

Procedure.

**Notice of
intended
claim.**

7. A tenant claiming compensation under this Act shall, two months at least before the determination of the tenancy, give notice in writing to the landlord of his intention to make such claim.

Where a tenant gives such notice, the landlord may, before the determination of the tenancy, or within fourteen days thereafter, give a counter-notice in writing to the tenant of his intention to make a claim in respect of any waste or any breach of covenant or other agreement.

Every such notice and counter-notice shall state, as far as reasonably may be, the particulars and amount of the intended claim.

8. The landlord and the tenant may agree on the amount and mode and time of payment of compensation to be paid under this Act. Compensation agreed or settled by reference.

If in any case they do not so agree the difference shall be settled by a reference.

9. Where there is a reference under this Act, a referee, or two referees and an umpire, shall be appointed as follows:— Appointment of referee or referees and umpire.

- (1) If the parties concur, there may be a single referee appointed by them jointly:
- (2) If before award the single referee dies or becomes incapable of acting, or for seven days after notice from the parties, or either of them, requiring him to act, fails to act, the proceedings shall begin afresh, as if no referee had been appointed:
- (3) If the parties do not concur in the appointment of a single referee, each of them shall appoint a referee:
- (4) If before award one of two referees dies or becomes incapable of acting, or for seven days after notice from either party requiring him to act, fails to act, the party appointing him shall appoint another referee:
- (5) Notice of every appointment of a referee by either party shall be given to the other party:
- (6) If for fourteen days after notice by one party to the other to appoint a referee, or another referee, the other party fails to do so, then, on the application of the party giving notice, the county court shall within fourteen days appoint a competent and impartial person to be a referee:
- (7) Where two referees are appointed, then (subject to the provisions of this Act) they shall before they enter on the reference appoint an umpire:
- (8) If before award an umpire dies or becomes incapable of acting, the referees shall appoint another umpire:
- (9) If for seven days after request from either party the referees fail to appoint an umpire, or another umpire, then, on the application of either party, the county court shall within fourteen days appoint a competent and impartial person to be the umpire.
- (10) Every appointment, notice, and request under this section shall be in writing.

10. Provided that, where two referees are appointed, an umpire may be appointed as follows: Requisition for appointment of umpire by Land Commissioners, &c.

- (1) If either party, on appointing a referee, requires, by notice in writing to the other, that the umpire shall be appointed by the Land Commissioners for England, then

the umpire and any successor to him, shall be appointed on the application of either party, by those commissioners.

2 In every other case, if either party on appointing a referee requires, by notice in writing to the other, that the umpire shall be appointed by the county court, then, unless the other party dissents by notice in writing therefrom the umpire, and any successor to him, shall on the application of either party be so appointed, and in case of such dissent the umpire, and any successor to him, shall be appointed on the application of either party, by the Land Commissioners for England.

Exercise of powers of county court.

11. The powers of the county court under this Act relative to the appointment of a referee or umpire shall be exercisable by the judge of the court having jurisdiction, whether he is without or within his district, and may, by consent of the parties, be exercised by the registrar of the court.

Mode of submission to reference.

12. The delivery to a referee of his appointment shall be deemed a submission to a reference by the party delivering it; and neither party shall have power to revoke a submission, or the appointment of a referee, without the consent of the other.

Power for referee, &c. to require production of documents, administer oaths, &c.

13. The referee or referees or umpire may call for the production of any sample, or voucher, or other document, or other evidence which is in the possession or power of either party, or which either party can produce, and which to the referee or referees or umpire seems necessary for determination of the matters referred, and may take the examination of the parties and witnesses on oath, and may administer oaths and take affirmations; and if any person so sworn or affirming wilfully and corruptly gives false evidence he shall be guilty of perjury.

Power to proceed in absence.

14. The referee or referees or umpire may proceed in the absence of either party where the same appears to him or them expedient, after notice given to the parties.

Form of award.

15. The award shall be in writing, signed by the referee or referees or umpire.

Time for award of referee or referees.

16. A single referee shall make his award ready for delivery within twenty-eight days after his appointment.

Two referees shall make their award ready for delivery within twenty-eight days after the appointment of the last appointed of them, or within such extended time (if any) as

they from time to time jointly fix by writing under their hands, so that they make their award ready for delivery within a time not exceeding in the whole forty-nine days after the appointment of the last appointed of them.

17. In any case provided for by sections three, four, or five, if compensation is claimed under this Act, such compensation as under any of those sections is to be deemed to be substituted for compensation under this Act, if and so far as the same can, consistently with the terms of the agreement, if any, be ascertained by the referees or the umpire, shall be awarded in respect of any improvements thereby provided for, and the award shall, when necessary, distinguish such improvements and the amount awarded in respect thereof; and an award given under this section shall be subject to the appeal provided by this Act.

Award in respect of compensation under ss. 3, 4, and 5

18. Where two referees are appointed and act, if they fail to make their award ready for delivery within the time aforesaid, then, on the expiration of that time, their authority shall cease, and thereupon the matters referred to them shall stand referred to the umpire.

Reference to and award by umpire.

The umpire shall make his award ready for delivery within twenty-eight days after notice in writing given to him by either party or referee of the reference to him, or within such extended time (if any) as the registrar of the county court from time to time appoints, on the application of the umpire or of either party, made before the expiration of the time appointed by or extended under this section.

19. The award shall not award a sum generally for compensation, but shall, so far as possible, specify—

Award to give particulars.

- (a) The several improvements, acts, and things in respect whereof compensation is awarded, and the several matters and things taken into account under the provisions of this Act in reduction or augmentation of such compensation;
- (b) The time at which each improvement, act, or thing was executed, done, committed, or permitted;
- (c) The sum awarded in respect of each improvement, act, matter, and thing; and
- (d) Where the landlord desires to charge his estate with the amount of compensation found due to the tenant, the time at which, for the purposes of such charge, each improvement, act, or thing in respect of which compensation is awarded is to be deemed to be exhausted.

20. The costs of and attending the reference, including the remuneration of the referee or referees and umpire,

Costs of reference.

where the umpire has been required to act, and including other proper expenses, shall be borne and paid by the parties in such proportion as to the referee or referees or umpire appears just, regard being had to the reasonableness or unreasonableness of the claim of either party in respect of amount, or otherwise, and to all the circumstances of the case.

The award may direct the payment of the whole or any part of the costs aforesaid by the one party to the other.

The costs aforesaid shall be subject to taxation by the registrar of the county court, on the application of either party, but that taxation shall be subject to review by the judge of the county court.

Day for
payment.

21. The award shall fix a day, not sooner than one month after the delivery of the award, for the payment of money awarded for compensation, costs, or otherwise.

Submission
not to be re-
movable, &c.

22. A submission or award shall not be made a rule of any court, or be removable by any process into any court, and an award shall not be questioned otherwise than as provided by this Act.

Appeal to
county court.

23. Where the sum claimed for compensation exceeds one hundred pounds, either party may, within seven days after delivery of the award, appeal against it to the judge of the county court on all or any of the following grounds:

1. That the award is invalid;
2. That the award proceeds wholly or in part upon an improper application of or upon the omission properly to apply the special provisions of sections three, four, or five of this Act;
3. That compensation has been awarded for improvements, acts, or things, breaches of covenants or agreements, or for committing or permitting waste, in respect of which the party claiming was not entitled to compensation;
4. That compensation has not been awarded for improvements, acts, or things, breaches of covenants or agreements, or for committing or permitting waste, in respect of which the party claiming was entitled to compensation;

and the judge shall hear and determine the appeal, and may, in his discretion, remit the case to be reheard as to the whole or any part thereof by the referee or referees or umpire, with such directions as he may think fit.

If no appeal is so brought, the award shall be final.

The decision of the judge of the county court on appeal shall be final, save that the judge shall, at the request of either

party, state a special case on a question of law for the judgment of the High Court of Justice, and the decision of the High Court on the case, and respecting costs and any other matter connected therewith, shall be final, and the judge of the county court shall act thereon.

24. Where any money agreed or awarded or ordered on appeal to be paid for compensation, costs, or otherwise, is not paid within fourteen days after the time when it is agreed or awarded or ordered to be paid, it shall be recoverable, upon order made by the judge of the county court, as money ordered by a county court under its ordinary jurisdiction to be paid is recoverable.

Recovery of compensation.

25. Where a landlord or tenant is an infant without a guardian, or is of unsound mind, not so found by inquisition, the county court, on the application of any person interested, may appoint a guardian of the infant or person of unsound mind for the purposes of this Act, and may change the guardian if and as occasion requires.

Appointment of guardian.

26. Where the appointment of a person to act as the next friend of a married woman is required for the purposes of this Act, the county court may make such appointment, and may remove or change that next friend if and as occasion requires.

Provisions respecting married women.

A woman married before the commencement of the Married Women's Property Act, 1882, entitled for her separate use to land, her title to which accrued before such commencement as aforesaid, and not restrained from anticipation, shall, for the purposes of this Act, be in respect of land as if she was unmarried.

45 & 46 Vict. c. 75.

Where any other woman married before the commencement of the Married Women's Property Act, 1882, is desirous of doing any act under this Act in respect of land, her title to which accrued before such commencement as aforesaid, her husband's concurrence shall be requisite, and she shall be examined apart from him by the county court, or by the judge of the county court for the place where she for the time being is, touching her knowledge of the nature and effect of the intended act, and it shall be ascertained that she is acting freely and voluntarily.

27. The costs of the Act shall be in the same manner as the Lord Chancellor may direct of costs for those registered of the county court.

P.

Under this Act a scale of costs in county court by the

Service of
notice, &c.

28. Any notice, request, demand, or other instrument under this Act may be served on the person to whom it is to be given, either personally or by leaving it for him at his last known place of abode in England, or by sending it through the post in a registered letter addressed to him there; and if so sent by post it shall be deemed to have been served at the time when the letter containing it would be delivered in ordinary course; and in order to prove service by letter it shall be sufficient to prove that the letter was properly addressed and posted, and that it contained the notice, request, demand, or other instrument to be served.

Charge of Tenant's Compensation.

Power for
landlord on
paying com-
pensation
to obtain
charge.

29. A landlord, on paying to the tenant the amount due to him in respect of compensation under this Act, or in respect of compensation authorised by this Act to be substituted for compensation under this Act, or on expending such amount as may be necessary to execute an improvement under the second part of the First Schedule hereto, after notice given by the tenant of his intention to execute such improvement in accordance with this Act, shall be entitled to obtain from the county court a charge on the holding, or any part thereof, to the amount of the sum so paid or expended.

The court shall, on proof of the payment or expenditure, and on being satisfied of the observance in good faith by the parties of the conditions imposed by this Act, make an order charging the holding, or any part thereof, with repayment of the amount paid or expended, with such interest, and by such instalments, and with such directions for giving effect to the charge, as the court thinks fit.

But, where the landlord obtaining the charge is not absolute owner of the holding for his own benefit, no instalment or interest shall be made payable after the time when the improvement in respect whereof compensation is paid will, where an award has been made, be taken to have been exhausted according to the declaration of the award, and in any other case after the time when any such improvement will in the opinion of the court, after hearing such evidence (if any) as it thinks expedient, have become exhausted.

The instalments and interest shall be charged in favour of the landlord, his executors, administrators, and assigns.

The estate or interest of any landlord holding for an estate or interest determinable or liable to forfeiture by reason of his creating or suffering any charge thereon shall not be determined or forfeited by reason of his obtaining a charge under this Act, anything in any deed, will, or other instrument to the contrary thereof notwithstanding.

Capital money arising under the Settled Land Act, 1882, may be applied in payment of any moneys expended and costs incurred by a landlord under or in pursuance of this Act in or about the execution of any improvement mentioned in the first or second parts of the schedule hereto, as for an improvement authorised by the said Settled Land Act; and such money may also be applied in discharge of any charge created on a holding under or in pursuance of this Act in respect of any such improvement as aforesaid, as in discharge of an incumbrance authorised by the said Settled Land Act to be discharged out of such capital money. 46 & 46 Vict.
c. 38.

30. The sum charged by the order of a county court under this Act shall be a charge on the holding, or the part thereof charged, for the landlord's interest therein, and for all interests therein subsequent to that of the landlord; but so that the charge shall not extend beyond the interest of the landlord, his executors, administrators, and assigns, in the tenancy where the landlord is himself a tenant of the holding. Incidence of
charge.

31. Where the landlord is a person entitled to receive the rents and profits of any holding as trustee, or in any character otherwise than for his own benefit, the amount due from such landlord in respect of compensation under this Act, or in respect of compensation authorised by this Act to be substituted for compensation under this Act, shall be charged and recovered as follows and not otherwise; (that is to say,) Provision
in case of
trustee.

- (1) The amount so due shall not be recoverable personally against such landlord, nor shall he be under any liability to pay such amount, but the same shall be a charge on and recoverable against the holding only.
- (2) Such landlord shall, either before or after having paid to the tenant the amount due to him, be entitled to obtain from the county court a charge on the holding to the amount of the sum required to be paid or which has been paid, as the case may be, to the tenant.
- (3) If such landlord neglect or fail within one month after the tenant has quitted his holding to pay to the tenant the amount due to him, then after the expiration of such one month the tenant shall be entitled to obtain from the county court in favour of himself, his executors, administrators, and assigns, a charge on the holding to the amount of the sum due to him incurred by him in obtaining the amount due thereunder.
- (4) The court shall on proof of charge made in his favour on the holding with payment of the

cluding costs, in like manner and form as in case of a charge which a landlord is entitled to obtain.

Advance
made by a
company.

32. Any company now or hereafter incorporated by Parliament, and having power to advance money for the improvement of land, may take an assignment of any charge made by a county court under the provisions of this Act, upon such terms and conditions as may be agreed upon between such company and the person entitled to such charge; and such company may assign any charge so acquired by them to any person or persons whomsoever.

Notice to Quit.

Time of
notice to
quit.

33. Where a half-year's notice, expiring with a year of tenancy is by law necessary and sufficient for determination of a tenancy from year to year, in the case of any such tenancy under a contract of tenancy made either before or after the commencement of this Act, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same, unless the landlord and tenant of the holding, by writing under their hands, agree that this section shall not apply, in which case a half year's notice shall continue to be sufficient; but nothing in this section shall extend to a case where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors.

Fixtures.

Tenant's
property in
fixtures, ma-
chinery, &c.

34. Where after the commencement of this Act a tenant affixes to his holding any engine, machinery, fencing, or other fixture, or erects any building for which he is not under this Act or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf or instead of some fixture or building belonging to the landlord, then such fixture or building shall be the property of and be removable by the tenant before or within a reasonable time after the termination of the tenancy.

Provided as follows:—

1. Before the removal of any fixture or building the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect to the holding :
2. In the removal of any fixture or building the tenant shall not do any avoidable damage to any other building or other part of the holding :
3. Immediately after the removal of any fixture or building the tenant shall make good all damage occasioned to any

other building or other part of the holding by the removal :

4. The tenant shall not remove any fixture or building without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it :
5. At any time before the expiration of the notice of removal the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture or building comprised in the notice of removal, and any fixture or building thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding ; and any difference as to the value shall be settled by a reference under this Act, as in case of compensation (but without appeal).

Crown and Duchy Lands.

35. This Act shall extend and apply to land belonging to Her Majesty the Queen, her heirs and successors, in right of the Crown. Application
of Act to
Crown lands.

With respect to such land, for the purposes of this Act, the Commissioners of Her Majesty's Woods, Forests, and Land Revenues, or one of them, or other the proper officer or body having charge of such land for the time being, or in case there is no such officer or body, then such person as Her Majesty, her heirs or successors, may appoint in writing under the Royal Sign Manual, shall represent Her Majesty, her heirs and successors, and shall be deemed to be the landlord.

Any compensation payable under this Act by the Commissioners of Her Majesty's Woods, Forests, and Land Revenues, or either of them, in respect of an improvement mentioned in the first or second part of the First Schedule hereto, shall be deemed to be payable in respect of an improvement of land within section one of the Crown Lands Act, 1866, and the amount thereof shall be charged and repaid as in that section provided with respect to the costs, charges, and expenses therein mentioned.

Any compensation payable under this Act by those Commissioners, or either of them, in respect of an improvement mentioned in the third part of the First Schedule hereto, shall be deemed to be part of the expenses of the management of the Land Revenues of the Crown, and shall be payable to those Commissioners out of such money and in such manner as the last-mentioned expenses are by law payable.

Application
of Act to land
of Duchy of
Lancaster.

36. This Act shall extend and apply to land belonging to Her Majesty, her heirs and successors, in right of the Duchy of Lancaster.

With respect to such land for the purposes of this Act, the Chancellor for the time being of the Duchy shall represent Her Majesty, her heirs and successors, and shall be deemed to be the landlord.

The amount of any compensation payable under this Act by the Chancellor of the Duchy in respect of an improvement mentioned in the first or second part of the First Schedule to this Act shall be deemed to be an expense incurred in improvement of land belonging to Her Majesty, her heirs or successors, in right of the Duchy, within section twenty-five of the Act of the fifty-seventh year of King George the Third, chapter ninety-seven, and shall be raised and paid as in that section provided with respect to the expenses therein mentioned.

The amount of any compensation payable under this Act by the Chancellor of the Duchy in respect of an improvement mentioned in the third part of the First Schedule to this Act shall be paid out of the annual revenues of the Duchy.

Application
of Act to land
of Duchy of
Cornwall.

37. This Act shall extend and apply to land belonging to the Duchy of Cornwall.

With respect to such land, for the purposes of this Act, such person as the Duke of Cornwall for the time being, or other the personage for the time being entitled to the revenues and possessions of the Duchy of Cornwall, from time to time, by sign manual, warrant, or otherwise, appoints, shall represent the Duke of Cornwall or other the personage aforesaid, and be deemed to be the landlord, and may do any act or thing under this Act which a landlord is authorised or required to do thereunder.

26 & 27 Vict.
c. 49.

Any compensation payable under this Act by the Duke of Cornwall, or other the personage aforesaid, in respect of an improvement mentioned in the first or second part of the First Schedule to this Act shall be deemed to be payable in respect of an improvement of land within section eight of the Duchy of Cornwall Management Act, 1863, and the amount thereof may be advanced and paid from the money mentioned in that section, subject to the provision therein made for repayment of sums advanced for improvements.

Ecclesiastical and Charity Lands.

Landlord,
archbishop or
bishop.

38. Where lands are assigned or secured as the endowment of a see, the powers by this Act conferred on a landlord shall not be exercised by the archbishop or bishop, in respect of

those lands, except with the previous approval in writing of the Estates Committee of the Ecclesiastical Commissioners for England.

39. Where a landlord is incumbent of an ecclesiastical benefice, the powers by this Act conferred on a landlord shall not be exercised by him in respect of the glebe land or other land belonging to the benefice, except with the previous approval in writing of the patron of the benefice, that is, the person, officer, or authority who, in case the benefice were vacant, would be entitled to present thereto, or of the Governors of Queen Anne's Bounty (that is, the Governors of the Bounty of Queen Anne for the Augmentation of the Maintenance of the Poor Clergy). Landlord, incumbent of benefice.

In every such case the Governors of Queen Anne's Bounty may, if they think fit, on behalf of the incumbent, out of any money in their hands, pay to the tenant the amount of compensation due to him under this Act; and thereupon they may, instead of the incumbent, obtain from the county court a charge on the holding, in respect thereof, in favour of themselves.

Every such charge shall be effectual, notwithstanding any change of the incumbent.

40. The powers by this Act conferred on a landlord in respect of charging the land shall not be exercised by trustees for ecclesiastical or charitable purposes, except with the previous approval in writing of the Charity Commissioners for England and Wales. Landlord, charity trustees, &c.

Resumption for Improvements, and Miscellaneous.

41. Where on a tenancy from year to year a notice to quit is given by the landlord with a view to the use of land for any of the following purposes: Resumption of possession for cottages, &c.

The erection of farm labourers cottages or other houses, with or without gardens;

The providing of gardens for existing farm labourers cottages or other houses;

The allotment for labourers of land for gardens or other purposes;

The planting of trees;

The opening or working of any coal, ironstone, limestone, or other mineral, or of a stone quarry, clay, sand, or gravel pit, or the construction of any works or buildings to be used in connection therewith;

The obtaining of brick earth, gravel, or sand;

The making of a watercourse or reservoir;

The making of any road, railway, tramroad, siding, canal or basin, or any wharf, pier, or other work connected therewith;

and the notice to quit so states, then it shall, by virtue of the Act, be no objection to the notice that it relates to part only of the holding.

In every such case the provisions of this Act respecting compensation shall apply as on determination of a tenancy in respect of an entire holding.

The tenant shall also be entitled to a proportionate reduction of rent in respect of the land comprised in the notice to quit, and in respect of any depreciation of the value to him of the residue of the holding, caused by the withdrawal of that land from the holding or by the use to be made thereof, and the amount of that reduction shall be ascertained by agreement or settled by a reference under this Act, as in case of compensation (but without appeal).

The tenant shall further be entitled, at any time within twenty-eight days after service of the notice to quit, to serve on the landlord a notice in writing to the effect that he (the tenant) accepts the same as a notice to quit the entire holding, to take effect at the expiration of the then current year of tenancy; and the notice to quit shall have effect accordingly.

Provision as to limited owners.

42. Subject to the provisions of this Act in relation to Crown, duchy, ecclesiastical, and charity lands, a landlord, whatever may be his estate or interest in his holding, may give any consent, make any agreement, or do or have done to him any act in relation to improvements in respect of which compensation is payable under this Act which he might give or make or do or have done to him if he were in the case of an estate of inheritance owner thereof in fee, and in the case of a leasehold possessed of the whole estate in the leasehold.

Provision in case of reservation of rent.

43. When, by any Act of Parliament, deed, or other instrument, a lease of a holding is authorised to be made, provided that the best rent, or reservation in the nature of rent, is by such lease reserved, then, whenever any lease of a holding is, under such authority, made to the tenant of the same, it shall not be necessary, in estimating such rent or reservation, to take into account against the tenant the increase (if any) in the value of such holding arising from any improvements made or paid for by him on such holding.

PART II.

Distress.

Limitation of distress in

44. After the commencement of this Act it shall not be lawful for any landlord entitled to the rent of any holding to which

this Act, applies to distrain for rent, which became due in respect of such holding, more than one year before the making of such distress, except in the case of arrears of rent in respect of a holding to which this Act applies existing at the time of the passing of this Act, which arrears shall be recoverable by distress up to the first day of January one thousand eight hundred and eighty-five to the same extent as if this Act had not passed.

respect of
amount and
time.

Provided that where it appears that according to the ordinary course of dealing between the landlord and tenant of a holding the payment of the rent of such holding has been allowed to be deferred until the expiration of a quarter of a year or half a year after the date at which such rent legally became due, then for the purpose of this section the rent of such holding shall be deemed to have become due at the expiration of such quarter or half year as aforesaid, as the case may be, and not at the date at which it legally became due.

45. Where live stock belonging to another person has been taken in by the tenant of a holding to which this Act applies to be fed at a fair price agreed to be paid for such feeding by the owner of such stock to the tenant, such stock shall not be distrained by the landlord for rent where there is other sufficient distress to be found, and if so distrained by reason of other sufficient distress not being found, there shall not be recovered by such distress a sum exceeding the amount of the price so agreed to be paid for the feeding, or if any part of such price has been paid exceeding the amount remaining unpaid, and it shall be lawful for the owner of such stock, at any time before it is sold, to redeem such stock by paying to the distrainer a sum equal to such price as aforesaid, and any payment so made to the distrainer shall be in full discharge as against the tenant of any sum of the like amount which would be otherwise due from the owner of the stock to the tenant in respect of the price of feeding: Provided always, that so long as any portion of such live stock shall remain on the said holding the right to distrain such portion shall continue to the full extent of the price originally agreed to be paid for the feeding of the whole of such live stock, or if part of such price has been bona fide paid to the tenant under the agreement, then to the full extent of the price then remaining unpaid.

Limitation of
distress in
respect of
things to be
distrained.

Agricultural or other machinery which is the bona fide property of a person other than the tenant, or the hire or use thereof in the live stock of all kinds which is the property of a person other than the tenant, a tenant solely for breeding purposes shall not be distrained for rent in arrear.

Remedy for wrongful distress under this Act.

46. Where any dispute arises—

- (a) in respect of any distress having been levied contrary to the provisions of this Act; or
- (b) as to the ownership of any live stock distrained, or as to the price to be paid for the feeding of such stock; or
- (c) as to any other matter or thing relating to a distress on a holding to which this Act applies:

such dispute may be heard and determined by the county court or by a court of summary jurisdiction, and any such county court or court of summary jurisdiction may make an order for restoration of any live stock or things unlawfully distrained, or may declare the price agreed to be paid in the case where the price of the feeding is required to be ascertained, or may make any other order which justice requires: any such dispute as mentioned in this section shall be deemed to be a matter in which a court of summary jurisdiction has authority by law to make an order on complaint in pursuance of the Summary Jurisdiction Acts; but any person aggrieved by any decision of such court of summary jurisdiction under this section may, on giving such security to the other party as the court may think just, appeal to a court of general or quarter sessions.

Set-off of compensation against rent.

47. Where the compensation due under this Act, or under any custom or contract, to a tenant has been ascertained before the landlord distrains for rent due, the amount of such compensation may be set off against the rent due, and the landlord shall not be entitled to distrain for more than the balance.

Exclusion of certiorari.

48. An order of the county court or of a court of summary jurisdiction under this Act shall not be quashed for want of form, or be removed by certiorari or otherwise into any superior court.

Limitation of costs in case of distress.

49. No person whatsoever making any distress for rent on a holding to which this Act applies when the sum demanded and due shall exceed the sum of twenty pounds for or in respect of such rent shall be entitled to any other or more costs and charges for and in respect of such distress or any matter or thing done therein than such as are fixed and set forth in the Second Schedule hereto.

Repeal of 2 W. and M. c. 5, s. 1, as to appraisement and sale at public auction.

50. So much of an Act passed in the second year of the reign of their Majesties King William the Third and Mary, chapter five, as requires appraisement before sale of goods distrained is hereby repealed as respects any holding to which this Act applies, and the landlord or other person levying a distress on such holding may sell the goods and chattels distrained without causing them to be previously appraised; and for the

purposes of sale the goods and chattels distrained shall, at the request in writing of the tenant or owner of such goods and chattels, be removed to a public auction room or to some other fit and proper place specified in such request, and be there sold. The costs and expenses attending any such removal, and any damage to the goods and chattels arising therefrom, shall be borne and paid by the party requesting the removal.

51. The period of five days provided in the said Act of William and Mary, chapter five, within which the tenant or owner of goods and chattels distrained may replevy the same shall, in the case of any distress on a holding to which this Act applies, be extended to a period of not more than fifteen days, if the tenant or such owner make a request in writing in that behalf to the landlord or other person levying the distress, and also give security for any additional costs that may be occasioned by such extension of time. Provided that the landlord or person levying the distress may, at the written request or with the written consent of the tenant, or such owner as aforesaid, sell the goods and chattels distrained or part of them at any time before the expiration of such extended period as aforesaid.

Extension
time to
replevy at
request of
tenant.

52. From and after the commencement of this Act no person shall act as a bailiff to levy any distress on any holding to which this Act applies unless he shall be authorised to act as a bailiff by a certificate in writing under the hand of the judge of a county court; and every county court judge shall, on or before the thirty-first day of December one thousand eight hundred and eighty-three, and afterwards from time to time as occasion shall require, appoint a competent number of fit and proper persons to act as such bailiffs as aforesaid. If any person so appointed shall be proved to the satisfaction of the said judge to have been guilty of any extortion or other misconduct in the execution of his duty as a bailiff, he shall be liable to have his appointment summarily cancelled by the said judge.

Bailiffs to be
appointed by
county court
judges.

PART III.

General Provisions.

53. This Act shall come into force on the first day of January, one thousand eight hundred and eighty-four, which day is in this Act referred to as the commencement of this Act.

Commence-
ment of Act.

54. Nothing in this Act shall apply to a holding that is not either wholly agricultural or wholly pastoral, or in part agricultural, and as to the residue pastoral, or in whole or in part

Holdings to
which Act
applies.

cultivated as a market garden, or to any holding let to the tenant during his continuance in any office, appointment, or employment held under the landlord.

Avoidance of agreement inconsistent with Act.

55. Any contract, agreement, or covenant made by a tenant, by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement mentioned in the First Schedule hereto (except an agreement providing such compensation as is by this Act permitted to be substituted for compensation under this Act), shall, so far as it deprives him of such right, be void both at law and in equity.

Right of tenant in respect of improvement purchased from outgoing tenant.

56. Where an incoming tenant has, with the consent in writing of his landlord, paid to an outgoing tenant any compensation payable under or in pursuance of this Act in respect of the whole or part of any improvement, such incoming tenant shall be entitled on quitting the holding to claim compensation in respect of such improvement or part in like manner, if at all, as the outgoing tenant would have been entitled if he had remained tenant of the holding, and quitted the holding at the time at which the incoming tenant quits the same.

Compensation under this Act to be exclusive.

57. A tenant shall not be entitled to claim compensation by custom or otherwise than in manner authorised by this Act in respect of any improvement for which he is entitled to compensation under or in pursuance of this Act, but where he is not entitled to compensation under or in pursuance of this Act he may recover compensation under any other Act of Parliament, or any agreement or custom, in the same manner as if this Act had not passed.

Provision as to change of tenancy.

58. A tenant who has remained in his holding during a change or changes of tenancy shall not thereafter on quitting his holding at the determination of a tenancy be deprived of his right to claim compensation in respect of improvements by reason only that such improvements were made during a former tenancy or tenancies, and not during the tenancy at the determination of which he is quitting.

Restriction in respect of improvements by tenant about to quit.

59. Subject as in this section mentioned, a tenant shall not be entitled to compensation in respect of any improvements, other than manures as defined by this Act, begun by him, if he holds from year to year, within one year before he quits his holding, or at any time after he has given or received final notice to quit, and, if he holds as a lessee, within one year before the expiration of his lease.

A final notice to quit means a notice to quit which has not

been waived or withdrawn, but has resulted in the tenant quitting his holding.

The foregoing provisions of this section shall not apply in the case of any such improvement as aforesaid—

- (1.) Where a tenant from year to year has begun such improvement during the last year of his tenancy, and, in pursuance of a notice to quit thereafter given by the landlord, has quitted his holding at the expiration of that year; and
- (2.) Where a tenant, whether a tenant from year to year or a lessee, previously to beginning any such improvement, has served notice on his landlord of his intention to begin the same, and the landlord has either assented or has failed for a month after the receipt of the notice to object to the making of the improvement.

60. Except as in this Act expressed, nothing in it shall take away, abridge, or prejudicially affect any power or remedy of a landlord, tenant, or other person lawfully exercisable by him by virtue of any other Act or under any custom of the country, or otherwise, in relation to a contract of tenancy or other contract, or of any improvement of waste emblements, tillages, away-going crops, fish, or other thing, or rate, tithe rentcharge, rent, or other thing.

61. In this Act—

“Contract of tenancy” means a letting of or agreement for the letting of land for a term of years, or for lives and years, or from year to year:

A tenancy from year to year under a contract of tenancy current at the commencement of the Act shall, for the purposes of this Act, be deemed to continue as a tenancy under a contract of tenancy current at the commencement of this Act until the first day on which the landlord or tenant of such tenancy could lawfully determine by giving notice to the other immediately after the commencement of this Act, cause such tenancy to determine, and on and after such day as aforesaid shall be deemed to be a tenancy under a contract of tenancy beginning after the commencement of this Act.

“Determination of tenancy” means the cessation of a tenancy by reason of effluxion of time, or by any other cause:

“Landlord” in relation to a holding means any person at the time being entitled to receive the rents or profits of any holding:

“Tenant” means the holder of land under a lease

term of years, or for lives, or for lives and years, or from year to year :

“Tenant” includes the executors, administrators, assigns, legatee, devisee, or next of kin, husband, guardian, committee of the estate or trustees in bankruptcy of a tenant, or any person deriving title from a tenant; and the right to receive compensation in respect of any improvement made by a tenant shall enure to the benefit of such executors, administrators, assigns, and other persons as aforesaid:

“Holding” means any parcel of land held by a tenant:

“County court,” in relation to a holding, means the county court within the district whereof the holding or the larger part thereof is situate:

“Person” includes a body of persons and a corporation aggregate or sole:

“Live stock” includes any animal capable of being distrained:

“Manures” means any of the improvements numbered twenty-two and twenty-three in the third part of the First Schedule hereto:

The designations of landlord and tenant shall continue to apply to the parties until the conclusion of any proceedings taken under or in pursuance of this Act in respect of compensation for improvements, or under any agreement made in pursuance of this Act.

Repeal of
Acts of 1875
and 1876.

62. On and after the commencement of this Act, the Agricultural Holdings (England) Act, 1875, and the Agricultural Holdings (England) Act, 1875, Amendment Act, 1876, shall be repealed.

Provided that such repeal shall not affect—

(a.) any thing duly done or suffered, or any proceedings pending under or in pursuance of any enactment hereby repealed; or

(b.) any right to compensation in respect of improvements to which the Agricultural Holdings (England) Act, 1875, applies, and which were executed before the commencement of this Act; or

(c.) any right to compensation in respect of any improvement to which the Agricultural Holdings (England) Act, 1875, applies, although executed by a tenant after the commencement of this Act if made under a contract of tenancy current at the commencement of this Act; or

(d.) any right in respect of fixtures affixed to a holding before the commencement of this Act;

and any right reserved by this section may be enforced after

the commencement of this Act in the same manner in all respects as if no such repeal had taken place.

63. This Act may be cited for all purposes as the Agricultural Holdings (England) Act, 1883. Short title of Act.

64. This Act shall not apply to Scotland or Ireland. Limits of Act.

FIRST SCHEDULE.

PART I.

IMPROVEMENTS TO WHICH CONSENT OF LANDLORD IS REQUIRED.

- (1.) Erection or enlargement of buildings.
- (2.) Formation of silos.
- (3.) Laying down of permanent pasture.
- (4.) Making and planting of osier beds.
- (5.) Making of water meadows or works of irrigation.
- (6.) Making of gardens.
- (7.) Making or improving of roads or bridges.
- (8.) Making or improving of watercourses, ponds, wells, or reservoirs, or of works for the application of water power or for supply of water for agricultural or domestic purposes.
- (9.) Making of fences.
- (10.) Planting of hops.
- (11.) Planting of orchards or fruit bushes.
- (12.) Reclaiming of waste land.
- (13.) Warping of land.
- (14.) Embankment and sluices against floods.

PART II.

IMPROVEMENT IN RESPECT OF WHICH NOTICE TO LANDLORD IS REQUIRED.

- (15.) Drainage.

PART III.

IMPROVEMENTS TO WHICH CONSENT OF LANDLORD IS NOT REQUIRED.

- (16.) Boning of land with undissolved bones.
- (17.) Chalking of land.
- (18.) Clay-burning.
- (19.) Claying of land.
- (20.) Liming of land.
- (21.) Marling of land.
- (22.) Application to land of purchased artificial or other purchased manure.
- (23.) Consumption on the holding by cattle, sheep, or pigs of cake or other feeding stuff not produced on the holding.

SECOND SCHEDULE.

Levying distress. Three per centum
not exceeding 50%. Two and a half
50%.

To bailiff for levy, 1*l.* 1*s.*

Being 20*l.* and Section 49.
exceeding

To man in possession, if boarded, 3s. 6d. per day; if not boarded 6s. per day.

For advertisements the sum actually paid.

To auctioneer. For sale five pounds per centum on the sum realised not exceeding 100l., and four per centum on any additional sum realised not exceeding 100l., and on any sum exceeding 200l. three per centum. A fraction of 1l. to be in all cases considered 1l.

Reasonable costs and charges where distress is withdrawn or where a sale takes place, and for negotiations between landlord and tenant respecting the distress; such costs and charges in case the parties differ to be taxed by the registrar of the county court of the district in which the distress is made.

APPENDIX (G). (a)

With respect to the question whether an action for permissive waste can be supported, the authorities are by no means satisfactory. It is conceived, however, that much of the difficulty upon this subject has arisen from not distinguishing between tenancies at will and tenancies from year to year, as affected by the provisions of the Statute of Gloucester. The Statute of Gloucester gives a remedy for waste in the case of tenancies for years, or for a less term than a year, but is held not to extend to tenancies strictly at will. (Co. Lit. 54 b. 57 a; 2 Inst. 302; *The Dean of Worcester's Case*, 6 Co. 37.) It has been expressly decided that those tenants who are within the provisions of the Statute are liable in an action of waste, as well for *permissive*, as for *voluntary* waste. (Co. Lit. 53 a; 2 Inst. 145; 2 Roll. Ab. tit. Waste, 816; *Glover v. Pipe*, Owen, 92; *Pomfret v. Ricroft*, 1 Wms. Saund. 323 c. n. 7; *Greene v. Cole*, 2 Id. 252 c. 259; *Pantam v. Ishan*, 1 Salk. 19; and see Harg. Co. Lit. 56 b. n. 376.) The question, therefore, is whether the action of case in the nature of waste, which was substituted in lieu of the action of waste, could not be supported for permissive waste in all those cases in which the old action could itself have been supported. In the *Countess of Salop's case* (Cro. Eliz. 777, 784) it was held that an action upon the case in nature of waste could not be maintained against a tenant *at will* for permissive waste; and the reason is stated to be, because the Statute of Gloucester does not extend the remedy by action of waste to the case of tenancies *at will*. Now, from this reason being assigned as the ground of decision, it seems a fair inference that an action upon the case would lie for permissive waste against a tenant for years; because, as against might have been brought under the Statute. Mr. Serj. Williams, in his notes to the cases of *Ricroft*, and *Greene v. Cole* (*supra*), is of opinion that an action upon the case may be brought for permissive, as for voluntary waste. It is thought that a contrary doctrine is

(a) See *ante*, p. 368.

modern decisions of the Courts, viz. *Gibson v. Wells*, 1 B. & Pul. N. R. 290; *Herne v. Benbow*, 4 Taunt. 764; *Jones v. Hill*, 7 Taunt. 392, S. C., 1 Moore (C. P.), 100. With respect to the first of these decisions, the judgment of the Court is certainly expressed in very general terms, and the marginal note states broadly that an action on the case does not lie for permissive waste. But it appears that, in this case, the action was in fact brought against a tenant at will, and it is observable that Mr. Serj. Williams, in the notes already referred to, cites this very authority, and does not consider it as conflicting with the opinion he lays down. As to the case of *Herne v. Benbow*, the decision turned upon a different point: in that case, however, the Court seem, undoubtedly, to have lost sight of the distinction between tenants for years and at will; for they cite the *Countess of Salop's* case as a general authority against the action for permissive waste, which, it has been seen, was a case of a tenancy at will, and could therefore decide nothing as to the action not being maintainable against a tenant for years. In the case of *Jones v. Hill*, the distinction between tenancies at will and for years was pressed upon the Court, and Gibbs, C. J., then declined to give any opinion upon the general question. But in *Harnett v. Maitland*, 16 M. & W. 257, the Court of Exchequer appear to have thought that the law was correctly stated by Mr. Serj. Williams, and that an action lay against a lessee for life, or years, for permissive waste. And again, in a later case (*Yellowly v. Gower*, 11 Exch. 274, 294) the same Court were of opinion that there was no doubt as to the liability of such tenants for permissive, as well as voluntary waste, and they pointed out that the cases of *Gibson v. Wells*, *Herne v. Benbow*, and *Jones v. Hill* were in reality no authorities to the contrary, for the reasons above stated. In *Woodhouse v. Walker*, 5 Q. B. D. 404, where there was a devise of houses to A. for life, "she keeping the houses in repair," the Court held that A. was liable to the remainderman in fee for permissive waste. But they said it was unnecessary to decide whether such an action could be maintained against a tenant for life or years, upon whom no express duty to repair is imposed by the instrument which creates the estate. It should be added that the Courts of Equity always refused to give a remedy in cases of permissive waste by a tenant for life; and in a recent case of *Barnes v. Dowling*, 44 L. T. 809, a Divisional Court, consisting of Lopes and Stephens, JJ., held that an action for permissive waste did not lie in the Queen's Bench Division against a tenant for life at the suit of a person having only an equitable estate. Their Lordships said that since the Judicature Act, if there was any variance between the rules of law and equity as to permissive waste, they were bound

to give effect to the latter. But as the Court of Chancery would not have interfered formerly to prevent a plaintiff enforcing his legal rights in respect of permissive waste but only itself refused to give a remedy, it is thought that their Lordships did not mean to decide that such an action would not now lie in the Queen's Bench Division by a plaintiff having the legal estate. Upon the whole, therefore, it is submitted that there is no sufficient reason to doubt that an action for permissive waste can be maintained in the Queen's Bench Division in cases where both parties have a legal estate, except in the case of tenancies at will, in the strict sense of the term. For further information on the subject of waste the reader is referred to Yool on Waste, and to Bullen and Leake's Prec. Pl. (3rd ed.), p. 422.

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"without impeachment of waste," 163, 188 (*f*), 361.
"works, ways, and roads," 150 (*k*).

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